154 US 349

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1291~~. 784 ~~435~~ 183

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

GEORGE HAMBLY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

FILED SEPTEMBER 18, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1291.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE HAMBLY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from State court	1	1
Summons	1	1
Complaint	2	2
Affidavit of service of summons and complaint	5	5
Amended complaint	6	5
Order sustaining demurrer to complaint, &c.	9	8
Demurrer to amended complaint	10	9
Notice of trial	10	9
Order overruling demurrer	11	10
Answer	12	11
Notice of trial	13	12
Note of issue	13	13
Petition for removal	14	13
Bond for removal	15	15
Clerk's certificate	16	16
Order taking motion to remand under advisement	18	16
Order to return transcript to State court for correction	18	17
Affidavit of John S. Watson	19	17
Motion to remand for correction	21	19
Notice of motion	21	19
Order to remand for correction	22	20
Order setting aside order to remand, &c.	22	20
Stipulation to correct transcript, &c.	23	20

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 16, 1891.

	Original.	Print.
Order commencing trial	24	21
Order concluding trial	24	21
Verdict	24	22
Judgment	25	22
Motion for new trial	26	22
Certificate of division in opinion	27	23
Stipulation to submit case in Supreme Court of the United States	29	25
Stipulation as to costs	30	25
Writ of error	32	26
Citation	33	27
Assignment of errors	34	28
Bond	36	28
Clerk's certificate	38	30

1 GEORGE HAMBLY
vs.
THE NORTHERN PACIFIC RAILROAD CO.

Pleas before the Hon. Henry C. Caldwell, judge of the circuit court of the United States for the eighth circuit and district of North Dakota, and the Honorable Alfred D. Thomas, judge of the district court of the United States for the district of North Dakota, sitting in said circuit court at the term of April, A. D. 1890.

Be it remembered that on the 26th day of February, 1890, the clerk of the district court in and for the county of Stutsman and State of North Dakota filed the following papers in said circuit court upon a petition for removal of said cause from the said district court of the State of North Dakota to the circuit court of the United States for the district of North Dakota; which said papers are in words and figures following, to wit:

Summons.

TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

District Court, Sixth Judicial District.

GEORGE HAMBLY
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY.

The Territory of Dakota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, of which a copy is hereunto annexed and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, in the city of Jamestown, in said county and Territory, within thirty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer said complaint within the time aforesaid the plaintiff in this action will take judgment against you for the sum of fifteen thousand and seventy-eight dollars, together with the costs and disbursements of this action.

Dated July 3rd, 1889.

S. L. GLASPELL,
Plaintiff's Attorney, Jamestown, Dakota Territory.

Upon the back of said summons appear endorsements in words and figures following, to wit:

Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Feb. 18, 1890, at 5 o'clock p. m. T. F. Branch, clerk.

2 TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

In District Court, Sixth Judicial District.

GEORGE HAMBLY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Complaint.

The plaintiff complains and alleges:

I.

That the defendant is a corporation organized and existing under the laws of the United States, and at all times mentioned in this complaint was the owner of and engaged in operating a railroad in and through the county of Stutsman and elsewhere in the Territory of Dakota.

II.

That on the first day of December, A. D. 1889, the plaintiff was in the employment of the defendant, engaged by the day as a day laborer, whose duty it was to act as helper with others for a crew of masons engaged in building a stone culvert for defendant on its right of way at a point about two miles west of the city of Jamestown, in said county; that plaintiff and other members of said crew of men were placed under one Gus. Lynde as foreman, who was entrusted by defendant with full power and control over said crew of men and this plaintiff, and with full power to direct their labors in the service of the defendant, and to enforce obedience to his commands; that said crew of men resided in the said city of Jamestown, and defendant had provided for their transportation to and from their place of labor as aforesaid a hand-car, and placed the same in the possession and charge of said Lynde. The said car was defective in construction and badly worn and was not provided with proper tools, equipments, or oils, of which the defendant had notice; that by reason of said defect the said hand-car was not suitable for the purpose of carrying said crew and was difficult to work, the said Lynde requiring the plaintiff and other members of the crew to propel or pump the same; that for a week prior to December 1st, 1888, and on said day the said car was not oiled, no oil being provided therefore, although plaintiff and other members of said crew had many times prior to said date and on the 30th day of November, 1888, notified the said Lynde of said defects in said car and want of oil, and he had repeatedly promised to see that said defects were remidied and a supply of oil and proper tools and appliances secured for operating said car. Prior to said December 1st, 1888, plaintiff had objected to riding on said car to and from the said place of work, but on the last day of November, 1888, he was ordered peremptorily by said

Lynde to take his place on the said car the following
3 morning and assist in moving the same to said culvert;
that on the morning of said December 1st, about 7 o'clock, the said car was by the order of said Lynde, in its said defective condition, started with said crew, including this plaintiff on board, from the division headquarters of defendant in Jamestown for said culvert. By reason of the defective condition of said car and by reason of the aforesaid want of oil, the bearings being very dry, producing great friction, the car required great and unusual exertion to move or propel the same and only a slow rate of speed was then possible, twenty minutes' time being consumed in making the distance travelled—an unnecessary waste of time, as with a properly equipped hand-car, in running order, the same distance could easily be made in ten minutes. At the end of said twenty minutes, and long after said car should have reached said culvert and been removed from the track, it had reached a point about one hundred and fifty yards east of said culvert, notwithstanding said crew had labored hard and unceasingly and to the limit of their ability to reach said point in the smallest possible time; and, being about to enter a deep cut situated at a sharp curve of defendant's track, it was met by an engine and passenger train of defendant, managed and controlled by defendant's servants, the said train being about three hours late or behind schedule time, and which suddenly, without notice or warning of any kind, was run around said curve, through said cut, and into and over said hand-car and this plaintiff, to his great injury and damage; that prior to said collision the plaintiff had no notice or knowledge that said train would pass said point at said time and no notice or knowledge of danger from collision with any train; that said passenger train and engine were running, when it collided with plaintiff, at a high and unusual rate of speed, to wit, about sixty miles an hour; that when said train was nearly upon the plaintiff and said hand-car, and running as aforesaid, the said Gus. Lynde commanded the plaintiff and all of said crew of men to alight and remove said hand-car from the track, which order plaintiff and others attempted to execute, but immediately thereafter and while plaintiff was engaged with others in lifting said car from the track, the engine collided with the said car and this plaintiff as aforesaid; that by said collision this plaintiff was then and there violently thrown by said engine into the air and down an embankment on the south side of the track, sustaining sever- and painful injuries in his right shoulder, right arm, and right foot, permanently disabling him; that his right arm was injured permanently and has been and now is worse than useless, as the result of said accident;
that his right foot was and is permanently maimed and dis-
4 abled, so as to prevent its use to any but a limited extent;
that for four months next succeeding said accident the plaintiff was confined to his room and suffered severe and continued pain and distress, and has ever since and now suffers great pain as the result of said injuries, and he is advised and believes that he will continue a sufferer from said injuries until the day of his death; that prior to said accident this plaintiff was a farmer and laborer

and engaged in the winter seasons in making mittens of leather and hides; that said injuries incapacitated him from doing any labor whatever and will always so incapacitate him from every employment, and he is now and will remain a helpless invalid, requiring constant care and nursing; that he has been damaged by said negligent acts of the defendant in the sum of fifteen thousand dollars.

III.

For a second and further cause of action against the defendant the plaintiff alleges that on or about June 1st, 1888, the plaintiff entered into the employment of the defendant as a day laborer at Jamestown, in said county and Territory, and at the same time and place entered into a verbal contract with defendant whereby, for a consideration of fifty cents per month, to be then and thereafter payed to defendant by plaintiff while plaintiff remained in the service of defendant, the defendant then and thereby agreed to insure and did insure said plaintiff against accident or sickness received in the employment of defendant while in its service, and did then and thereby agree to pay plaintiff the sum of three dollars per week while plaintiff should be disabled from such cause for a period not exceeding six months. Plaintiff alleges that he was on the first day of December, A. D. 1888, in the employment of defendant and engaged in its service, and he was, in said county, while employed as aforesaid, and without fault or negligence on his part, run over and injured by a passing engine and train, and by reason of said injury was sick and disabled for more than six months next succeeding; that at all said times while in defendant's employment he paid to defendant for said insurance a monthly payment of fifty cents and in all things complied with his part of said agreement, but that defendant refuses to pay him the said sum of three dollars per week as and for said indemnity, and has not paid the same nor any part thereof; and plaintiff alleges that defendant is indebted to him in the sum of three dollars per week for six months, or twenty-six weeks, making a total of seventy-eight dollars. Wherefore plaintiff asks judgment against the defendant for the sum of fifteen thousand
5 and seventy-eight dollars ($15,078), with interest and costs.

S. L. GLASPELL,
Att'y for Plaintiff.

TERRITORY OF DAKOTA, }
County of Stutsman, } ss:

George Hambly, being first duly sworn, deposes and says that he is the plaintiff in the foregoing-entitled action; that he has read the complaint therein and knows the contents of the same, and that the statements therein contained are true of his own knowledge, except such matters as are therein stated upon information and belief, and as to those matters he believes it to be true.

GEORGE HAMBLY.

Subscribed and sworn to before me this 3rd day of July, A. D. 1889.

[SEAL.] F. D. ALEXANDER,
Notary Public, Stutsman Co., D. T.

TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

F. D. Alexander, being first duly sworn, deposes and says that he is and at the times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to the above-entitled action; that at the city of Jamestown, county and Territory aforesaid, on the 3rd day of July, A. D. 1889, he served the within summons and complaint upon the within-named defendant, The Northern Pacific Railroad Company, by delivering to and leaving with E. J. Schwellenbach personally a true and correct copy of said summons and complaint, he being then and there the duly appointed and acting station agent of the defendant at their station at Jamestown, in the county and Territory aforesaid.

F. D. ALEXANDER.

Subscribed and sworn to before me this 3rd day of July, 1889.

[SEAL.] JESSE A. FRYE,
Notary Public, Stutsman Co., D. T.

Upon the back of the above affidavit appear endorsements in words and figures following, to wit:

Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Feb. 18, 1890, at 5 o'clock p. m. T. F. Branch, clerk.

Upon the back of said complaint appear endorsements in words and figures following, to wit:

1444. Original. District court, county of Stutsman. George Hambly, plaintiff, *vs.* The Northern Pacific Railroad Company, defendant. Summons and complaint. Filed in the office of clerk dist. court, Stutsman county, N. Dakota, Feb. 18, 1890, at 5
6 o'clock p. m. T. F. Branch, clerk. S. L. Glaspell, att'y for plaintiff, Jamestown, D. T.

Amended Complaint.

District Court, Sixth Judicial District.

TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

GEORGE HAMBLY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Amended Complaint.

The plaintiff complains and alleges:

I.

That the defendant is a corporation organized and existing under

the laws of the United States; that at all times mentioned in this complaint it was the owner of and engaged in operating a railroad in and through the county of Stutsman and elsewhere in the Territory of Dakota.

II.

That on the first day of December, 1888, the plaintiff was and for about thirty days prior thereto had been in the employment of defendant as a laborer, whose duty it was to act as a helper for a crew of men engaged in building a stone culvert for defendant on its right of way at a point about two miles west of the city of Jamestown, in said county; that prior to said times the defendant had employed one Gus. Lind as foreman and placed him in charge of the building of said stone culvert, and had authorized him to employ the men composing the said crew for said work, with full power, authority, and control over said work and the men employed; with authority to enforce obedience to his commands; with authority to discharge each and any of the men in said crew, including plaintiff, and employ others according to his judgment, and with full authority to manage and direct the said work and every part thereof.

III.

That at and prior to said day the defendant furnished the said Lindh a certain hand-car and directed him to use the same in the transportation of tools and materials for building said culvert and the men in his said crew from Jamestown to said place of work. Said hand-car was by defendant given into the possession and control of said Lindh as foreman of said crew, with full authority to compel the men in said crew to use the same as aforesaid. The said car was defective in construction and badly worn and was not pro-
vided with proper tools, equipments, or oils, of which the de-
7 fendant had notice; that by reason of the said defects the said hand-car was not suitable for the purpose of carrying said crew and was difficult to work; that for a week prior to December 1st, 1888, and on said day the said car was not oiled, no oil being supplied for such purpose by defendant; that prior to said day the plaintiff had given the said Lindh notice of the defects in said car and want of oil, and he had promised to see that such defects were remedied and oil supplied. Prior to said day plaintiff had objected to riding on said car to and from the said place of work, but on the last day of November, 1888, he was directed by the said Lindh to be on hand at the starting point the following morning and assist in propelling said car to said culvert; that on the morning of said December 1st, about seven o'clock, the said car was by the order of said Lindh started from the division headquarters of the defendant in Jamestown with said crew, including the plaintiff, on board. By reason of the defective condition of said car and by reason of the aforesaid want of oil, the bearings being dry and producing great friction, the car required great and unusual exertion to move or propel the same, for which reasons more time was consumed in making

said trip than would have been necessary with a properly equipped car in running order; and long after said car should have reached said culvert and been removed from the track it had only reached a point about one hundred and fifty yards east of said culvert, notwithstanding said crew had labored hard and unceasingly and to the limit of their ability to reach said point in the smallest possible time. Being about to enter a deep cut situated at a sharp curve of defendant's track, the hand-car was met by an engine and passenger train owned by defendant and operated by defendant's servants.

The said passenger train was three hours late or behind schedule time and was run suddenly, without notice or warning to the plaintiff or the men on said car, around said curve and through said cut at a speed of sixty miles per hour and into and over said hand-car and this plaintiff.

IV.

That plaintiff had no notice or knowledge that said train was delayed and no notice or knowledge that any train would or could be met by said hand-car in the said passage from Jamestown to said culvert. He had no notice or knowledge that any train might, could, or would be met by said car in passing to said culvert.

Plaintiff had no notice or knowledge of any rule, practise, or
8 regulation of the defendant whereby he might expect to meet a train on defendant's railroad at any time or place or that defendant would run trains over its road without notice. On the first day of December, 1888, and prior thereto defendant had not made or promulgated any such rule or regulation and had not given notice to plaintiff or to any of said crew of any such rule or practise, and defendant at no time gave to plaintiff or to said Lindh instructions or information as to meeting trains while going to and from said place of work; that said Gus. Lindh on the morning of December 1st, 1888, started with said crew of men on said hand-car as aforesaid from the division headquarters of the defendant at Jamestown, at which point the defendant owned and used a telegraph station in connection with its said railroad and kept its train-dispatcher, and the said Lindh, without making inquiry as to the position or location of trains on the road or making any effort or attempt to ascertain the situation of trains on the defendant's railroad, negligently and carelessly ordered and required the said crew of men and plaintiff to mount said car and propel the same to said culvert as aforesaid; that plaintiff was compelled to obey said order upon penalty of being discharged, and without notice or knowledge of danger proceeded with due diligence and care upon his part to assist in moving said car to the culvert aforesaid, and by reason of being closely engaged in said work and by reason of the said curve in defendant's track plaintiff did not hear or see the approaching train or have any notice or knowledge of danger until too late to avoid the same; that defendant negligently and carelessly ran a passenger train around a sharp curve and through a deep cut without any signal by blowing a whistle, in violation of the rules and regulations of the defendant, and at a high and danger-

ous rate of speed, to wit, sixty miles per hour, and in excess of the speed permitted by the rules and custom of the defendant; that when said train was nearly upon the plaintiff and said hand-car, and running as aforesaid, the said Gus. Lindh negligently and carelessly commanded the plaintiff and all of said crew to alight and remove said car from the track, which order the plaintiff and others attempted to execute, but immediately thereafter the engine collided with said hand-car and struck and injured plaintiff; that by said collision plaintiff was then and there violently thrown by said engine into the air and down an embankment on the side of defendant's track, sustaining severe and painful injuries in his right shoulder, right arm, and right foot, which injuries are permanent and do now and will permanently disable plaintiff; that
9 plaintiff has suffered severe pain and inconvenience from said injuries and will continue to suffer therefrom; that prior to said accident plaintiff was a farmer and laborer; that said injuries have since said Dec. 1st, 1888, incapacitated him from doing any labor whatever and *and* will always prevent him from performing manual labor, and he is now and will always be a helpless invalid, requiring constant care and nursing.

Wherefore plaintiff says he has been damaged by the negligence of the defendant, and without fault on his part, in the sum of fifteen thousand dollars, for which sum he asks judgment against the defendant, and for costs.

S. L. GLASPELL,
Attorney for Plaintiff.

TERRITORY OF DAKOTA, } *ss:*
County of Stutsman, }

George Hambly being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, and the statements therein contained are true of his own knowledge.

GEORGE HAMBLY.

Subscribed and sworn to before me this 17th day of August, A. D. 1889.

[SEAL.]

S. L. GLASPELL,
Notary Public.

Upon the back of said amended complaint appear endorsements in words and figures following, to wit:

1444. District court, county of Stutsman. George Hambly, plaintiff, *vs.* Northern Pacific Railroad Company, defendant. Amended complaint. Service of within amended complaint admitted this 19th day of August, A. D. 1889. John S. Watson, att'y for def't. S. L. Glaspell, attorney for pl't'ff, Jamestown, Dakota. Filed in the office of clerk dis't court for Stutsman county, Dakota Ter., Nov. 13, 1889, at 11 o'clock, a. m. T. F. Branch, clerk.

TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

In District Court, Sixth Judicial District.

GEORGE HAMBLY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Order.

And now, on this 13th day of August, A. D. 1889, this cause coming on to be heard on the demurrer of defendant to the complaint, the plaintiff appearing by S. L. Glaspell, his attorney, and the defendant appearing by John S. Watson, its attorney, the plaintiff now consents that the demurrer be sustained, and asks for time and leave to serve and file an amended complaint. The demurrer to the complaint is now sustained, and it is ordered that the plaintiff have leave to file an amended complaint herein within thirty days from this date.

Done by the court at chambers this 13th day of August, 1889.

RODERICK ROSE, *Judge.*

Upon the back of said order appear endorsements in words and figures following, to wit:

1444. District court, county of Stutsman. George Hambly, plaintiff, *vs.* Northern Pacific Railroad Company, defendant. Order. Service of the within order is admitted Aug. 13th, 1889. Jno. S. Watson, def't's att'y. S. L. Glaspell, attorney for pl't'ff, Jamestown, Dakota.

TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

District Court.

GEORGE HAMBLY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The defendant in the above-entitled action demurs to the amended complaint herein upon the ground that said amended complaint does not state facts sufficient to constitute a cause of action against said defendant.

Wherefore said defendant prays to be dismissed with its costs.

Dated August 22nd, 1889.

JNO. S. WATSON,
Att'y for Defendant, Jamestown, Dakota.

Service of the foregoing by copy thereof is admitted this Sept. 21st, 1889.

S. L. GLASPELL,
Pl't'ff's Att'y.

Upon the back of said demurrer appear endorsements in words and figures following, to wit:

1444. Filed in the office of clerk dist. court Stutsman county, N. Dakota, Dec. 2, 1889, at 10 o'clock a. m. T. F. Branch, clerk.

Notice of Trial (Issue of Law).

TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

In the District Court, Sixth Judicial District.

GEROEGE HAMBLY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

11 SIR: You will please take notice that the issue of law in the above-entitled action will be brought on for trial before the Hon. Roderick Rose, judge of the district court, sixth judicial district, of the Territory of Dakota, at chambers, at the court-house, in the city of Jamestown, county of Stutsman, Territory of Dakota, on the 22nd day of October, A. D. 1889, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated Octo. 14th, A. D. 1889.

Yours respectfully, S. L. GLASPELL,
Attorney for Pl't'ff.

To John S. Watson, attorney for def't.

Upon the back of the said notice of trial appear endorsements in words and figures following, to wit:

1444. District court, sixth judicial district, county of Stutsman. George Hambly *vs.* The N. P. R. R. Co. Notice of trial. Issue of law. Due service of the within notice is hereby admitted this 14th day of October, 1889, at Jamestown, D. T. John S. Watson, attorney for def't. Filed in the office of clerk of dist. court for Stutsman county, Dakota Ter., Nov. 13, 1889, at 11 o'clock a. m. T. F. Branch, clerk.

Demurrer Overruled.

In District Court, Sixth Judicial District.

TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

GEORGE HAMBLY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Order overruling demurrer.

On this 4th day of November, this cause coming on to be heard on the demurrer of the defendant to the plaintiff's complaint, S. L. Glaspell appearing for the plaintiff and John S. Watson appearing for the defendant, and after examining the papers and record and after hearing the argument of counsel for both parties, the court

overrules the said demurrer, and the defendant is permitted to answer the complaint within ten days after service of this order upon its attorney.

By the court, at chambers, Jamestown, D. T.

RODERICK ROSE, *Judge.*

Service of the above order is hereby admitted this 4th day of Nov., 1889.

JNO. S. WATSON,
Att'y for Defendant.

Upon the back of said order overruling demurrer appear endorsements in words and figures following, to wit:

12 1444. George Hambly *vs.* N. P. R'y Co. Order overruling demurrer. Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Feb. 18, 1890, at 5 o'clock p. m. T. F. Branch, clerk.

Answer.

STATE OF NORTH DAKOTA, }
Stutsman County. }

In District Court, Fifth Judicial District.

GEORGE HAMBLY }
vs. }
NORTHERN PACIFIC RAILROAD COMPANY. }

The defendant, in answer to plaintiff's complaint herein, alleges:

I.

It admits the allegations of paragraph one of said complaint to be substantially true.

II.

Further answering, defendant denies each and every allegation in said complaint contained, save as hereinbefore expressly admitted, and specifically denies that by reason of any of the matters or things in said complaint alleged said plaintiff has been damaged in the sum of fifteen thousand dollars or in any sum.

For a further defense said defendant alleges that the injuries, if any, received by the plaintiff were the result of his own negligence and carelessness and were not caused by the negligence or carelessness of defendant or any of its agents or servants.

Wherefore defendant demands that this action be dismissed, and for its costs.

JOHN S. WATSON,
Defendant's Attorney.

STATE OF NORTH DAKOTA, }
Stutsman County. }

John S. Watson, being duly sworn, on oath says he is attorney

for the defendant in the action above entitled; that he has read the foregoing answer, and the same is true to the best of his knowledge, information, and belief; that this affidavit of verification is made by affiant for the reason that none of the officers of defendant are present in the county of Stutsman, wherein this affiant resides.

JOHN S. WATSON.

Subscribed and sowrn to before me this Nov. 7th, 1889.

[Seal of S. L. Glaspell, Notary Public, Stutsman Co., N. D.]

——— ———.

Service of the foregoing answer by copy thereof at Jamestown, North Dakota, this November 11th, 1889.

S. L. GLASPELL,
Plaintiff's Att'y.

Upon the back of said answer appear endorsements in words and figures following, to wit:

13 1444. Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Feb. 14, 1890, at 9 o'clock a. m. T. F. Branch, clerk.

Notice of Trial.

STATE OF NORTH DAKOTA, } *ss:*
County of Stutsman, }

GEORGE HAMBLY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Def't.

District Court, Fifth Judicial District.

SIR: You will please take notice that the issue of law and fact in the above-entitled action will be brought on for trial at the next regular term of the district court, to be held in and for the county of Stutsman, at the court-house, in the city of Jamestown, in said county, on the 3rd day of December, A. D. 1889, at the opening of said court on that day or as soon thereafter as counsel can be heard.

Yours respectfully, S. L. GLASPELL,
Attorney for Plaintiff.

Dated Nov. 12, A. D. 1889.

To John S. Watson, Esq., attorney for defendant.

Upon the back of said notice of trial appear endorsements in words and figures following, to wit:

1444. District court, fifth judicial district, county of Stutsman. George Hambly *vs.* The N. P. R. R. Co. Notice of trial. Due service of the within notice is hereby admitted this 12th day of Nov., 1889, at Jamestown, N. D. John S. Watson, attorney for def't. Filed in the office of clerk dist. court for Stutsman county, Dakota Ter., Nov. 13, 1889, at 11 o'clock a. m. T. F. Branch, clerk.

Note of Issue.

District Court, County of Stutsman, 5th Judicial District.

GEORGE HAMBLY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Note of issue. Issue of law and fact.

Last pleading served Nov. 12, 1889.

S. L. GLASPELL,
Attorney for Plaintiff.
JOHN S. WATSON,
Attorney for Defendant.

Will the clerk please file this note of issue and enter upon the calendar for the Dec., A. D. 1889, term of this court.

Yours, &c., S. L. GLASPELL,
Attorney for Plaintiff.

Upon the back of said note of issue appear endorsements in words and figures following, to wit:

1444. Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Nov. 22, 1889, at 2 o'clock p. m. T. F. Branch, clerk.

14 *Petition and Bond on Removal to U. S. Circuit Court, District N. Dakota.*

STATE OF NORTH DAKOTA,
Stutsman County.

In District Court, Fifth Judicial District.

GEORGE HAMBLY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To the honorable the court aforesaid:

The petition of The Northern Pacific Railroad Company, the defendant in the above-entitled action, respectfully shows that said defendant is a corporation, not banking, duly organized, created, and existing under and by virtue of that certain act of Congress of the United States approved July 2nd, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," and those certain subsequent acts and joint resolutions of Congress relating to the same subject-matter; that by virtue of said acts and joint resolutions of Congress said defendant has constructed and now owns, maintains, and operates a line of railroad and telegraph extending westwardly from Lake Superior to Puget Sound; that the above-entitled action has been commenced and is now pending in this court; that the date of the commencement of said action was on or about the 3rd of July, 1889; that the same has not yet been tried; that the amount in controversy in

said action exceeds the sum of two thousand dollars, exclusive of costs and interest; that the amount so involved is the sum of fifteen thousand dollars, as will more fully appear by reference to the complaint therein; that by reason of the premises said action is an action arising under the laws of the United States; and, furthermore, your petitioner has a defense thereto arising under the laws of the United States; that said action arose and was commenced in the Territory of Dakota and within the limits of that portion of said Territory which has since the commencement of said action been admitted into the Union and become one of the States of the United States as the State of North Dakota; that said action was pending in the district court for Stutsman county at the time of the admission of said State of North Dakota into the Union; that said action is a suit of which the circuit court of the United States for the district of North Dakota might have had jurisdiction under the laws of the United States had such circuit court of the United States for the district of North Dakota been in existense at the time of the commencement of said action, and that by
15 reason of the premises the petitioner is entitled, under the acts of Congress for such cases made and provided and more particularly under that certain act of Congress approved Feb'y 22nd, 1889, entitled "An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States and to make donations of public lands to such States," to remove said action into the circuit court of the United States for the district of North Dakota for the proceedings therein, and to that end herewith tenders to this court proper and sufficient surety for the doing by it of the several things required by the said acts to be done upon the removal of a cause into a United States court.

Wherefore your petitioner prays that the said surety may be accepted, and that this court proceed no further in said cause, and that the same be transmitted to the circuit court of the United States for the district of North Dakota for further proceedings therein.

Dated November 25th, 1889.

JOHN S. WATSON,
Attorney for Petitioner.

Upon the back of said petition appear endorsements in words and figures following, to wit:

Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Nov. 29, 1889, at 2 o'clock p. m. T. F. Branch, clerk.

Bond on Removal to United States Court.

STATE OF NORTH DAKOTA, }
Stutsman County. }

In District Court, Fifth Judicial District.

GEORGE HAMBLY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Bond on removal to United States court.

Know all men by these presents that we, E. P. Wells and C. P. Smith, sureties of the Northern Pacific Railroad Company, are held and firmly bound unto George Hambly, the plaintiff in the above-entitled suit, in the penal sum of five hundred dollars ($500.00), lawful money of the United States; for the payment of which, well and truly to be made, we hereby bind ourselves and our executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated on this November 25th, 1889.

Whereas the said Northern Pacific Railroad Company has filed its petition in the court aforesaid praying for the removal into the circuit court of the United States for the district of North
16 Dakota of the above-entitled suit under and by virtue of the acts of Congress for such cases made and provided: Now, therefore, if the said Northern Pacific Railroad Company shall enter into the circuit court of the United States for the district of North Dakota on the first day of its session hereafter copy of the record in said suit and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, in such case the above obligation to be void, but otherwise to remain of full force and effect.

Signed, sealed, and delivered in presence of—

E. P. WELLS.
C. P. SMITH.

STATE OF NORTH DAKOTA, }
Stutsman Co-nty. }

Personally came before me the undersigned, E. P. Wells and C. P. Smith, the same persons who executed the foregoing instrument, and acknowledged that they executed the same freely and voluntarily, and each of said persons, being by me duly sworn, did depose and say that he is a resident and freeholder of this State and worth the sum of one thousand dollars above his debts, liabilities, and property exempt from levy and sale under execution.

E. P. WELLS.
C. P. SMITH.

Subscribed and sworn to before me this Nov. 27th, 1889.
[SEAL.] GEORGE WYLLIE,
Notary Public.

Upon the back of said bond appear endorsements in words and figures following, to wit:

The foregoing bond is hereby accepted and approved. Roderick Rose, judge. Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Nov. 29, 1889, at 2 o'clock p. m. T. F. Branch, clerk.

Upon the back of said petition for removal to circuit court and bond appear endorsements in words and figures following, to wit:

1444. District court, county of Stutsman. George Hambly, plaintiff, *vs.* Northern Pacific Railroad Company, defendant. Petition and bond on removal to U. S. circuit court, dist. N. Dak. John S. Watson, attorney for plaintiff, Jamestown, Dakota.

Clerk's Certificate.

I, T. F. Branch, clerk of the district court within and for the county of Stutsman, North Dakota (formerly Territory of Dakota), do hereby certify that the annexed and foregoing papers, to wit, summons and complaint, the amended complaint, two notices of trial, note of issue, answer, demurrer and order sustaining demurrer, order overruling
17 demurrer, and petition and bond of defendant for the removal of said cause to the United States circuit court for the district of North Dakota, constitute and are all the files, records, and proceedings which have been filed in my office and in the office of the clerk of the district court for Stutsman county, Territory of Dakota, in the case of George Hambly, plaintiff, *versus* The Northern Pacific Railroad Company, defendant, and the said files, records, and proceedings are hereby transmitted to the United States circuit court for the district of North Dakota, in accordance with the prayer of said petition.

In witness whereof I have hereunto set my hand and affixed the official seal of said court this February twenty-first, A. D. 1890.

[SEAL.] T. F. BRANCH,
Clerk of District Court, Stutsman County, North Dakota.

18 Thereupon afterwards, at the April term of said court, on the 7th day of April, 1890, the following proceedings were had in said case, as appears of record on folio 5, Journal "A," of said court:

GEORGE HAMBLY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

On motion of S. L. Glaspell, attorney for plaintiff, to remand this cause for want of proper jurisdiction, the same is hereby taken under advisement.

Thereupon afterwards, at the April term of said court, on the 8th day of April, 1890, the following proceedings were had in said case, as appears of record on folio 6, Journal "A," of said court:

GEORGE HAMBLY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

On motion of Jno. S. Watson, attorney for defendant, to return papers in above-entitled action for correction, it is hereby ordered that the papers in said action, together with said motion, be at once transmitted to the clerk of the district court in and for Stutsman county, North Dakota, as prayed for in said motion.

Thereupon afterwards, to wit, on the 9th day of April, 1890, a motion to remand for correction of error in record was filed in said case; which said motion is in words and figures following, to wit:

19 In the United States Circuit Court for the District of North Dakota, Eighth Circuit.

GEORGE HAMBLY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NORTH DAKOTA,
Stutsman County.

John S. Watson, being duly sworn, on oath says that he is and at all times since the beginning of said action above entitled has been the attorney for the defendant; that he appeared for the defendant and supported the demurrer to the amended complaint in said action; that the record of the ruling of the district court for Stutsman county upon said demurrer is erroneous in this, that the argument upon said demurrer was not made upon the same date upon which said order overruling the same was signed and dated, but on a date prior to Nov. 2nd, 1889; that said argument was in fact heard on or about October 22nd, 1889, pursuant to the notice thereof served upon affiant and contained in the records of this case; that affiant recollects and knows of his own knowledge that the judge of said court, after hearing the arguments of S. L. Glaspell and affiant upon said demurrer, said that he (said judge) would take the matter under advisement, examine the authorities, and render his decision at some future time. Affiant distinctly remembers and knows of his own knowledge that the argument upon said demurrer occurred at least ten days prior to the date of said order of Nov. 4th, 1889. According to the best of his recollection and belief the same occurred on October 22nd, 1889, the time specified in said notice.

That affiant keeps in his office a blotter in which are entered charges for services rendered clients. Said blotter under date of November 1st, 1889, contains twenty-one different entries, nearly all of which relate to business done in the last half of the month of October, 1889. Affiant is not careful in keeping such blotter to enter thereon upon the date performed his charges to clients for services rendered, but that he usually on the first day of each month enters up all charges for services rendered during the preceding month, which

have not been noted at the time. One of the entries made upon said blotter and bearing date November 1st, 1889, is as follows:

"N. P. R. R. Co., Dr.

To arguing dem. Hambly ---------- $25.00"

20 That except as to retainers affiant never charges a client upon his books for services in advance of the rendition of the same; that on November 4th, 1889, being the date of the order overruling said demurrer, affiant wrote a letter to Jno. C. Bullit, Jr., assistant counsel for defendant, at St. Paul, Minn., from which letter the following is an extract:

"JAMESTOWN, DAKOTA, *Nov. 4th*, 1889.

Jno. C. Bullitt, St. Paul, Minn.

DEAR SIR: In the case of Hambly *vs.* the Co. I argued the demurrer to the amended complaint last week, and to-day Judge Rose overruled the same and gave us ten days in which to answer. I will draw and serve an answer of general denial unless I hear differently from you at once.

(The remainder of the letter relates to other matters.)

Yours truly, J. S. WATSON."

That said letter was written upon affiant's type-writer and a copy thereof in legible form appears upon affiant's copy book, page 742; that shortly thereafter affiant received a letter from said Jno. C. Bullitt, of which the following is a part:

"Northern Pacific Railroad Company, office of counsel.

ST. PAUL, MINN., *Nov. 6th*, 1889.

John S. Watson, Esq., att.-at-law, Jamestown, Dakota.

DEAR SIR: I have your- of the 4th. Please prepare and serve answer in case of Hambly *vs.* the company.

(Remainder of letter relates to other matters.)

Yours truly, JOHN C. BULLITT,
Assistant Counsel."

That Hon. Roderick Rose, the judge who signed said order and before whom said argument was made, has this day and at other times informed affiant that, according to his clear recollection, he did not decide said demurrer upon the same day upon which it was argued, and that such argument was had some time prior to Nov. 2nd, 1889; that the correction of said error is material to defendant in this, that the determination of the motion now pending to remand this cause to the State court depends upon whether defendant submitted itself to the jurisdiction of such State court upon Nov. 4th, 1889, and thereby waived its right of transfer to this court: that such record, in so far as it purports to show that defend-

21 ant, by its attorney, so appear- upon Nov. 4th, is misleading and incorrect and not in accordance with the facts; that the

defendant in this cause will lose valuable rights if such error be not corrected.

Wherefore affiant prays that the record in this cause may be remanded to the judge of the district court for Stutsman county, North Dakota (being the same person who, as judge, made said order, and before whom the arguments upon said demurrer were had), for the correction of said error; and affiant will ever pray.

JNO. S. WATSON.

Subscribed and sworn to before me this April 8th, 1890.

[SEAL.] O. H. HEWIT,
Notary Public.

Motion to Remand for Correction of Error in Record.

Comes now the defendant, by its attorney, J. S. Watson, and moves the court to remand this cause to the district court for Stutsman county, North Dakota, to the end and for the sole purpose that the judge of said court may correct an error in the record of said cause, to wit, the date of the appearance of defendant's attorney upon the argument of the demurrer to the amended complaint, the date of such appearance being erroneously given as of November 4th, 1888, when in fact the same was upon some date prior to Nov. 2nd, 1889.

JOHN S. WATSON,
Attorney for Defendant.

Notice of Motion.

To S. L. Glaspell, attorney for plaintiff:

Take notice that the above motion will be brought to a hearing before the court, at the court-house, in the city of Bismarck, on the ninth day of April, 1890, at the hour of two o'clock p. m. of that day, or as soon thereafter as counsel can be heard.

JNO. S. WATSON,
Def't's Att'y.

Service of the foregoing by copy is admitted this April 8th, 1890.

S. L. GLASPELL,
Pl't'ff's Att'y.

Upon the back of said motion to remand for correction of error in record appear endorsements in words and figures following, to wit:

In U. S. circuit court, dist. N. Dak. Geo. Hambly *vs.* Nor. 22 Pac. R. R. Co. Motion to remand for correction of error. John S. Watson, attorney for def't, Jamestown, Dakota. Filed April 9th, 1890. Wm. Booth, Jr., clerk.

Thereupon, afterwards, at the April term of said court, on the 14th day of April, 1890, the following proceedings were had in said case, as appears of record on folio 7 of Journal "A" of said said court:

GEORGE HAMBLY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The clerk is hereby directed to enter order remanding above-entitled cause, pursuant to petition.

Thereupon, afterwards, at the April term of said court, on the 15th day of April, 1890, the following proceedings were had, as appear- of record on folio 8 of Journal "A" of said court:

GEORGE HAMBLY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD CO., Defendant.

It appearing to the court, since the order of April 14th was directed to remand this cause to the district court for Stutsman county, that the defendant has not waived its right to remove said cause to this court, and that this court may maintain jurisdiction thereof, it is ordered that the direction and order of April 14th to remand be, and the same is, vacated and set aside, and that the cause remain upon the calendar for trial, this court now having jurisdiction thereof, and the same stand for trial April 21st, at 10 o'clock a. m., pursuant to stipulation on file.

Thereupon, afterwards, to wit, on the 16th day of April, 1890, a stipulation was filed in said case, which stipulation is in words and figures following, to wit:

23 *Stipulation.*

In the Circuit Court of the United States, District of North Dakota.

GEORGE HAMBLY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

It is hereby stipulated by and between the parties to this action that the records in this action made by the district court of Stutsman county are erroneous and incorrect in so far as they purport to show that the defendant ever in any manner submitted itself to the jurisdiction of the State court after the admission of the State of North Dakota into the Union and prior to the filing of defendant's petition for a removal to the United States circuit court, and that the record may be so corrected as to show that defendant never so submitted itself; that plaintiff's motion to remand may be denied or withdrawn; that both parties expressly waive all questions and rights growing out of said motion to remand, and fully consent that this court may retain full jurisdiction of *of* said cause, and that the same shall be tried and determined at the present term of said court. They further consent that said cause may be returned to said court by the clerk of the district court for Stutsman county in case the papers therein shall have been received by him prior to the filing of this stipulation; that the argument upon the demurrer to the amended

complaint was in fact had and the case submitted prior to the admission of North Dakota into the Union, and the record may and should be so amended.

Dated April 15th, 1890.

S. L. GLASPELL, *Pl'tff's Att'y.*
JNO. S. WATSON, *Def't's Att'y.*

Upon the back of said stipulations appear endorsements in words and figures following, to wit:

2 A. United States circuit court, district of N. D. Hambly *vs.* N. P. R'y Co. Stipulation. Filed Apr. 16, 1890. Wm. Booth, Jr., clerk.

24 Thereupon, afterwards, at the April term of said court, on the 22nd day of April, 1890, the following proceedings were had in said case, as appears of record on folios 14 and 15 of Journal "A" of said court:

GEORGE HAMBLY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD CO., Defendant. } Trial.

Now comes the parties herein, by their attorneys; also come the following-named persons as jurors, to wit, Enos Gray, C. P. Thurston, Andrew Walker, F. W. Shiffield, J. S. Wesier, Wm. Lloyd, Arthur Elliot, Lewis Hicks, R. A. Shattuck, Horace Hance, Harvey Harris, E. H. Wilson, who were duly impanelled and sworn according to law; and thereupon, after hearing the evidence in part and the time having arrived for the adjournment of the court and the trial of this cause not being finished, the same was continued until ten o'clock to-morrow.

Thereupon, afterwards, at the April term of said court, on the 23rd day of April, 1890, the following proceedings were had in said case, as appears of record on folio 17, Journal "A," of said court:

GEORGE HAMBLY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant. }

This day again come the said parties, by their attorneys, and also come the jury heretofore empanelled and sworn, and the trial proceeded; and the said jury, having heard the remaining evidence, testimony, the argument, and charge of the court, retire to their room, in charge of a bailiff, for deliberation, and, the hour of adjournment having arrived, the court orders that if said jury agree upon a verdict they return the same sealed to this court to-morrow morning at 10 o'clock.

Thereupon, afterwards, at the April term of said court, on the 24th day of April, 1890, the following proceedings were had in said case, as appears of record on folios 18 and 20 of Journal "A" of this court:

GEORGE HAMBLY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Verdict.

Now comes said jury into open court and present to the court their verdict, which is in words and figures following, to wit:

25 In the Circuit Court of the United States, District of North Dakota.

GEORGE HAMBLY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

We, the jury, find for the plaintiff and assess his damages at twenty-five hundred dollars.

W. M. LLOYD, *Foreman.*

GEORGE HAMBLY, Plaintiff,
vs.
NORTHER PACIFIC RAILROAD COMPANY, Defendant. } Judgment on Verdict.

The jury in this action having, on this 24th day of April, 1890, rendered a verdict for the plaintiff and against the defendant, and assessed the plaintiff's damages at the sum of two thousand five hundred dollars ($2,500), on motion of said plaintiff, by S. L. Glaspell, his attorney, it is ordered and adjudged by the court that the plaintiff is entitled to judgment on said verdict, and that said plaintiff have and recover of and from said defendant the said sum of two thousand five hundred dollars, together with costs, taxed at $53.50, and that execution issue therefor.

Thereupon, afterwards, to wit, on the 21st day of April, 1890, a motion for a new trial was filed in said case; which said motion for a new trial is in words and figures following, to wit:

26 *Motion for New Trial.*

In the United States Circuit Court, District of North Dakota.

GEORGE HAMBLEY, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Motion for New Trial.

Comes now defendant, by its attorney, John S. Watson, and moves the court to vacate and set aside the verdict of the jury herein and for a new trial upon the following grounds materially affecting the substantial rights of the defendant:

I.

The court erred in denying and overruling defendant's motion for an instruction to the jury to return a verdict for defendant, which motion was made at the conclusion of plaintiff's testimony.

II.

The court erred in denying and overruling defendant's motion for an instruction to the jury to return a verdict for the defendant, which motion was made at the conclusion of all the testimony and is set out at length in the bill of exceptions herein.

III.

The court erred in refusing to give the instructions asked by the defendant relative to the fellow-service of the plaintiff and *and* the persons in charge of the passenger train, which proposed instruction is set out in full and at length in the bill of exceptions herein.

IV.

The court erred in instructing the jury, in substance, that it was not contributory negligence for the plaintiff to mount the hand-car at the order *or* the foreman upon the morning in question, even though he knew that Linde had orders to always send a man ahead and did not do so upon that morning, such instruction, to which defendant objected, being set forth at length, with the exception thereto, in the bill of exceptions herein.

V.

The court erred in instructing the jury, in substance, that it was not contributory negligence for plaintiff, if he thought the
27 safety of the passenger train required it, to imperil his own life and safety in attempting to remove the hand-car from the track, such instruction, to which defendant objected, being set forth at length, with the exception thereto, in the bill of exceptions herein.

JOHN S. WATSON,
Defendant's Att'y.

Upon the back of said motion for new trial appear endorsements in words and figures as follows, to wit:

In U. S. circuit court, district North Dakota. George Hambly, pl't'ff, *vs.* The Northern Pacific Railroad Company, defendant. Motion for new trial. Filed April 25th, 1890. Wm. Booth, Jr., clerk.

Thereupon, afterwards, to wit, on the 26th day of April, 1890, a bill of finding was filed in said case, as appears of record on folios 30, 31, and 32 of Journal "A" of said court; which said bill of finding is in words and figures following, to wit:

Circuit Court of the United States, District of North Dakota. April Term, A. D. 1890.

GEORGE HAMBLY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD CO., Defendant.

Be it remembered that on the trial of this cause, before the Hon. Henry C. Caldwell, circuit judge of the United States for the eighth

circuit, and the Hon. Alfred D. Th-mas, district judge of the United States for the district of North Dakota, and a jury, the following facts were proved and admitted to be true by both parties, viz: That the plaintiff was a common laborer in the employ of the defendant company, and at the time he received the injury which is the ground of this action he was in the service of the defendant, working under the direction and supervision of a section "boss" or foreman of the defendant company, assisting in building a culvert on defendant's line of railroad, and that while so engaged the injury complained of and for which he sues was inflicted upon him by being struck by a locomotive of a moving passenger train on
28 the defendant's road (said train belonging to the defendant and being operated by a conductor and engineer in its employ), and that the injury he received by coming in contact with said passenger train and which is the injury sued for in this cause was due solely to the misconduct and negligence of the conductor and locomotive engineer on said passenger train in operating and conducting the movements of said train.

Based upon the foregoing agreed facts, the defendant prayed the court to instruct the jury that the engineer and conductor of said passenger train were fellow-servants with the plaintiff, and that for that reason the defendant company was not liable to the plaintiff for the injury he received through the negligence of said conductor and engineer.

On the question of giving said instructions the opinions of the judges were opposed, and the circuit judge, being of the opinion that the plaintiff and said conductor and engineer on the facts stated were not fellow-servants in a sense that would exempt the defendant from liability to the plaintiff for the injuries which he received through the negligence of said conductor and engineer, refused to give said instruction, and instructed the jury that on the said facts the plaintiff and said conductor and engineer were not fellow-servants.

The jury having returned a verdict for the plaintiff for the sum of twenty-five hundred dollars, and judgment having, by direction of the circuit judge, been entered on said verdict for the plaintiff, the defendant thereupon filed a motion for a new trial and to set aside said verdict and judgment upon the ground that the court erred in instructing the jury that on the facts admitted and hereinbefore set out the plaintiff and the said conductor and engineer were not fellow-servants, and also erred in not instructing the jury to return a verdict for the defendant.

And on the question as to whether a new trial should be granted in this cause for the said grounds alleged in the motion therefor the opinions of the judges were opposed, and thereupon said motion for a new trial was overruled in conformity to the opinion of the circuit judge.

And the judges certify that on the trial of this cause the following questions became and were material questions in the determination of said cause, and that upon said questions the opinions of the judges were opposed, namely:

1st. Whether, on the admitted facts of this case hereinbefore set out, the jury should have been instructed that the plaintiff and said conductor and engineer were fellow-servants, and that
29 they should return a verdict for the defendant.

2nd. Whether, on the facts hereinbefore set out, the court should have set aside the verdict and judgment in the case and granted defendant a new trial.

3rd. Whether the plaintiff, who was a common day laborer in the employ of the defendant (which is a railroad company owning and operating a line of railroad) and who was at the time he received the injury complained of working for the defendant under the order and direction of a section "boss" or foreman on a culvert on the line of defendant's road, was a fellow-servant with the engineer and conductor operating and conducting a passenger train on the defendant's road in such a sense as to exempt the defendant from liability for an injury inflicted on the plaintiff by and through the negligence of said conductor and engineer in moving and operating said passenger train.

And now, during the same term, under the direction of the judges, the foregoing questions, upon which the opinions of the judges were opposed, are here stated and certified and ordered to be entered of record and certified to the Supreme Court of the United States.

(Signed) HENRY C. CALDWELL,
United States Circuit Judge for the Eighth Circuit.
(Signed) ALFRED D. THOMAS,
United States District Judge for the District of North Dakota.

Upon the back of said bill of finding appear endorsements in words and figures following, to wit:

2 A. Hambly *vs.* N. P. R'y Co. Bill of finding. Filed April 26, 1890. Wm. Booth, Jr., clerk.

Thereupon, afterwards, to wit, on the 30th day of April, 1890, a stipulation for appeal was filed in said case; which said stipulation is in words and figures following, to wit:

In the Circuit Court of the United States for the District of North Dakota. April Term, 1890.

GEORGE HAMBLY
vs.
THE NORTHERN PACIFIC RAILROAD CO.

30 The judges having been opposed in their opinions in this cause and having granted a certificate of their division of opinion in conformity to the statute, it is hereby agreed and stipulated that the case shall be submitted to the Supreme Court of the United States under the 20th rule of that court, and that the record

shall be filed in that court by the first day of September next by the defendant and printed briefs filed in the case by the second Monday in October next.

Dated April 29th, 1890.

S. L. GLASPELL,
Plaintiff's Attorney.
JNO. S. WATSON,
Defend'nt's Attorney.

Upon the back of said stipulation appear endorsements in words and figures following, to wit:

U. S. circuit court, district of North Dakota. George Hambly *vs.* N. P. R. R. Co. Stipulation for appeal. Filed April 30, 1890. J. A. Montgomery, clerk.

Thereupon, afterwards, to wit, on the 10th day of May, 1890, a stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

In the U. S. Circuit Court, District of North Dakota.

GEORGE HAMBLY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

It is hereby stipulated that the plaintiff's costs herein are $53.50, and may be taxed by the clerk in such sum as part of the judgment herein.

S. L. GLASPELL,
Att'y for Plaintiff.
JNO. S. WATSON,
Att'y for Defendant.

Costs taxed and allowed at $53.50, pursuant to the above stipulation, this 10th day of May, 1890.

J. A. MONTGOMERY, *Clerk.*

Upon the back of said stipulation appear endorsements in words and figures following, to wit:

U. S. circuit court, district of N. Dakota. George Hambly
31 *vs.* N. P. R. R. Co. Stipulation for costs. Filed May 10, 1890.
J. A. Montgomery, clerk.

Thereupon, afterwards, to wit, on the 20th day of June, 1890, a writ of error was allowed in said case and citation issued thereon, of which said writ of error and said citation the following are the originals:

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of North Dakota, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit

court, before you, between George Hambly, plaintiff, and The Northern Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the defendant, Northern Pacific Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of June, A. D. 1890.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY,
Clerk of the Circuit Court of the United States
for the District of North Dakota,
By EDW'D S. ALLEN, *Deputy.*

[Endorsed:] U. S. circuit court, district of N. Dakota. George Hambly *vs.* N. P. R. R. Co. Writ of error. Filed June 20, 1890. J. A. Montgomery, clerk, by Edw'd S. Allen, deputy.

33 THE UNITED STATES OF AMERICA:

To George Hambly, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, anno Domini eighteen hundred and ninety, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of North Dakota, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States Supreme Court, this 18th day of June, in the year of our Lord one thousand eight hundred and ninety.

ALFRED D. THOMAS,
District Judge.

[Endorsed:] U. S. circuit court, district of North Dakota. George Hambly *vs.* N. P. R. R. Co. Citation. Filed June 20, 1890. J. A. Montgomery, clerk, by Edw'd S. Allen, deputy.

34 In the Supreme Court of the United States. October Term, A. D. 1890.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
GEORGE HAMBLY, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, D. C., comes the said Northern Pacific Railroad Company, by Jno. C. Bullitt, Jr., & Jno. S. Watson, its attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. The court erred in refusing to instruct the jury, upon request of defendant, that the engineer and conductor of said passenger train were fellow-servants with the plaintiff, and that for that reason the defendant was not liable to the plaintiff for the injury which he received through the negligence of said engineer and conductor.

Second. The court erred in instructing the jury that upon the facts stated in this case the plaintiff and said conductor and engineer were not fellow-servants.

Third. The court erred in denying and overruling the motion for a new trial made by plaintiff in error.

Fourth. The court erred in rendering judgment against the plaintiff in error.

35 And the said Northern Pacific Railroad Company, plaintiff in error, prays that the judgment aforesaid may be reversed and annulled, and that it may be restored to all things which it hath lost by occasion of the said judgment.

JNO. C. BULLITT, JR.,
JNO. S. WATSON,
Attorneys for the Plaintiff in Error.

[Endorsed:] U. S. circuit court, district of North Dakota. George Hambly *vs.* N. P. R. R. Co. Filed June 20, 1890. J. A. Montgomery, clerk, by Edw'd S. Allen, deputy.

36 Thereupon, afterwards, to wit, on the 20th day of June, 1890, a supersidias bond was filed in said case; which bond is in words and figures following, to wit:

In the United States Circuit Court, District of North Dakota.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
GEORGE HAMBLY, Defendant in Error.

Know all men by these presents that we, Northern Pacific Railroad Company, a corporation existing under the laws of the United States, as principal, and E. P. Wells and C. P. Smith, as sureties, are held and firmly bound unto George Hambly in the full and just sum of five thousand dollars, to be paid to the said George Hambly, his certain attorney, executors, administrators, or assigns; to which

payment, well and truly to be made, we bind ourselves, our successors, heirs, administrators, and executors, jointly and severally, by these presents.

Sealed with our seals and dated this May 26th, A. D. 1890.

Whereas lately, at a session of the circuit court of the United States for the district of North Dakota, in a suit depending in said court between George Hambly as plaintiff and said Northern Pacific Railroad Company as defendant, a final judgment was, on the twenty-fourth day of April, 1890, rendered in favor of said George Hambly and against the said Northern Pacific Railroad Company for the sum of two thousand five hundred and fifty-three dollars and fifty hundredths ($2,553.50), and the said Northern Pacific Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation, directed to the said George Hambly, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden in Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Northern Pacific Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if said Northern Pacific Railroad Company fail to make good its plea, then the above obligation to be void; else to remain in full force and effect.

37 In witness whereof the said Northern Pacific Railroad Company has caused these presents to be executed by its vice-president and attested by its assistant secretary and its corporate seal to be affixed hereto, and the said E. P. Wells and C. P. Smith have duly affixed their names and seals hereto the day and year first above written.

NORTHERN PACIFIC RAILROAD COMPANY,
By JAMES P. WILLIAMS, *Vice-President.*
[SEAL.] Attest: GEO. H. EARL, *Assistant Secretary.*
C. P. SMITH.
E. P. WELLS.

STATE OF NORTH DAKOTA, }
County of Stutsman. }

E. P. Wells and C. P. Smith, being severally and duly sworn, each for himself says that he is one of the parties who executed the foregoing bond; that he is worth the full sum of five thousand dollars over and above all of his debts and liabilities and exclusive of all property by law exempt from levy and sale under execution.

E. P. WELLS.
C. P. SMITH.

Subscribed and sworn to before me this June 5th, 1890.
[SEAL.] GEORGE WYLIE,
Notary Public.

Upon the back of said bond appear endorsements in words and figures following, to wit:

U. S. circuit court, district of North Dakota. George Hambly *vs.* N. P. R. R. Co. Supersedias bond. Filed June 20, 1890. J. A. Montgomery, clerk, by Edw'd S. Allen, deputy. The within bond and sureties are hereby approved. Alfred D. Thomas, judge U. S. D. C., dist. No. Dak.

38 UNITED STATES OF AMERICA, *District of North Dakota*, } *ss:*

By virtue of the foregoing writ of error and in obedience thereto, I, J. A. Montgomery, clerk of the circuit court of the United States for the district of North Dakota, in the eighth circuit, do hereby certify that the foregoing pages, from one to thirty-seven, contain true and faithful transcripts of the pleadings and proceedings of record and on file in my office as said clerk to this date in the case of George Hambly *vs.* The Northern Pacific Railroad Company, and that a copy of the writ of error has been lodged and remains in my said office.

Witness my hand and the seal of said court, at Fargo, this 26th day of August, 1890.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY, *Clerk.*

Endorsed on cover: North Dakota C. C. U. S. No. 1291. The Northern Pacific Railroad Company, plaintiff in error, *vs.* George Hambly. Filed September 18, 1890.

No. 784.

Supreme Court of the

OCTOBER TERM, 1894.

NORTHERN PACIFIC RAILROAD COMPANY,

Plaintiff in Error,

vs.

GEORGE HARDLEY.

Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

SAMUEL L. GLASPELL,

Attorney for Defendant in Error.

No. 784.

Supreme Court of the United States,

OCTOBER TERM, 1891.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

GEORGE HAMBLY,
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR

SAMUEL L. GLASPELL,
Attorney for Defendant in Error.

The defendant in error comes now by his attorney, Samuel L. Glaspell, and moves this Honorable Court to dismiss the writ of error herein issued to the Circuit Court of the United States for the district of North Dakota, with costs against the plaintiff in error, upon the following statement and grounds, to-wit:

STATEMENT.

In the Circuit Court of the United States for the district of North Dakota, the defendant in error secured a verdict and judgment against the plaintiff in error April 24th, 1890, for two thousand and five Hundred Dollars ($2500.) On April 24th, 1890, the judges being opposed in their opinions as to certain questions arising on the trial of the action, a certificate of such division of opinion was made and filed in the words and figures following: (See transcript of record, page 23.)

CIRCUIT COURT OF THE UNITED STATES,
DISTRICT OF NORTH DAKOTA,
April Term, A. D. 1890.

GEORGE HAMBLY, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Be it remembered that on the trial of this cause before the Hon. Henry C. Caldwell, Circuit Judge of the eighth circuit, and the Hon. Alfred D. Thomas, District Judge for the District of North Dakota, and a jury, the following facts were proved and admitted to be true by both parties, viz: That the plaintiff was a common laborer in the employ of the defendant company and at the time he received the injury, which is the ground of this action, he was in the service of the defendant working under the direction or supervision of a "boss" or foreman of the defendant company assisting in building a culvert on defendant line of railroad; and that while so engaged the injury complained of, and for which he sues, was inflicted upon him by being struck by a locomotive of a moving passenger train on the defendant's road, (said train belonging to the defendant and being op-

erated by a conductor and engineer in its employ,) and that the injury he received by coming in contact with said passenger train, and which is the injury sued for in this case, was solely due to the misconduct and negligence of the conductor and engineer on said passenger train in operating and conducting the movements of said train.

Based upon the foregoing agreed facts the defendant prayed the Court to instruct the jury that the engineer and conductor of said passenger train were fellow servants with the plaintiff and that for that reason the defendant company was not liable to plaintiff for the injury he received through the negligence of said conductor and engineer.

On the question of giving such instruction the opinions of the Judges were opposed, and the Circuit Judge being of the opinion that the plaintiff and said conductor and engineer on the facts stated were not fellow servants in a sense that would exempt the defendant from liability to the plaintiff for the injuries which he received through the negligence of said conductor and engineer refused to give said instruction and instructed the jury that on the said facts the plaintiff and said conductor and engineer were not fellow servants.

The jury having returned a verdict for the plaintiff for the sum of Twenty-five Hundred Dollars, and judgment having, by direction of the Circuit Judge, been entered on said verdict for the plaintiff, the defendant thereupon filed a motion for a new trial and to set aside said verdict and judgment upon the ground that the Court erred in instructing the jury that upon the facts admitted and hereinbefore set out the plaintiff and said conductor and engineer

154 US 349

Office Supreme Court U. S.
FILED.
OCT 12 1891
JAMES H. McKENNEY.
CLERK

IN THE

Supreme Court of the United States.

October Term, 1891.

THE NORTHERN PACIFIC RAILROAD CO.,
Plaintiff in Error,
vs.
GEORGE HAMBLY.
No. 784.

In Error to the Circuit Court of the United States for the District of North Dakota.

Brief for Plaintiff in Error, on Motion to Dismiss the Writ of Error.

A. H. GARLAND,
H. J. MAY,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

October Term, 1891.

THE NORTHERN PACIFIC RAILROAD CO.,
Plaintiff in Error,

vs.

GEORGE HAMBLY.

No. 784.

In Error to the Circuit Court of the United States for the District of North Dakota.

Brief for Plaintiff in Error on Motion to Dismiss the Writ of Error.

The circuit and district judges were opposed in their opinions, and final judgment was entered in accordance with the opinion of the presiding judge for $2,500 damages, and costs taxed at $53.50 (Rec., 22). The defendant below has brought the case here by writ of error on a certificate of division of opinion. The jurisdiction of this court does not depend on the amount in controversy, but is conferred by sections 650, 652, 693, and 697. (Dow v. Johnson, 100 U. S., 158, 163; Jewell v. Knight,

123 U. S., 432; Smith *v.* Kraft, *Ib.*, 440; Fost. Fed. Pr., secs. 394–396.)

The question presented by the certificate of division of opinion is single and distinct, and may be stated as follows:

Whether the defendant in error, who was a common laborer in the employment of the Northern Pacific Railroad Company, under the supervision and direction of a boss or foreman of the company, engaged in building a culvert on the line of the railroad, and the conductor and engineer in the employment of the same company, on a moving passenger train on the same line of railroad and belonging to the same company, were fellow-servants in the employment of the railroad company at the time the injury complained of was received by the defendant in error, and which was caused solely by the misconduct and negligence of the conductor and engineer (Record, 23–25).

A motion has been made to dismiss the writ of error for four reasons: Because the court is without jurisdiction; because the entire case is presented for decision; because the questions certified are of mixed law and fact; because the points on which the judges were opposed are not clearly stated, and sufficient facts are not set forth upon which to solve the question.

The questions raised by the motion are not discussed in their order in counsel's brief. The first point assigned was probably intended to relate to the amount, although the others assigned are but jurisdictional and would come within the first, but if it was intended to apply only to the amount, we have shown by the authorities above that this is not a question here. The second, third, and fourth grounds of the motion will be presented together.

The second ground for dismissal is that the entire case is presented for decision. This point is not well taken if there is but one distinct legal question involved in the

case, and it will be observed by reference to brief of counsel for defendant in error, that he admits the "troublesome fellow-servant question" is the only one involved. And it matters not how many questions may be certified, if as in this case they are all directed to the solution of one legal proposition. The three questions under consideration "require an opinion virtually on only one point," namely, fellow-servants.

In United States *v.* Chicago, 7 How., 185, 192, the court held that—

"Where the questions are several in number and so material as to decide the whole case, this court will not dismiss them, provided they appear to have arisen at one time, at one stage of the cause, and to have involved little beyond one point." * * * "And the principle embraced in the other branch of this objection, to acting on several points which dispose of the whole case, is not that the whole case may not properly be disposed of by one decision on what is certified, but that the decision must in substance be not on several questions arising in various stages of the cause, and some of them anticipated and presented so as to cover the whole case."

It was also held that if questions were presented involving the right of the matter in controversy, this court would entertain them. See also Leland *v.* Wilkinson, 10 Pet., 294; Daniels *v.* Railroad Co., 3 Wall., 255.

It appears that there is but one question involved, and the court may dispose of it notwithstanding it decides the whole case. There can be no doubt that the point presented in the first and third questions certified is the same, and that it arose at the same time, and in the same stage of the case.

The second question is probably not subject to certification. (United States *v.* Daniel, 6 Wheat., 542; Grant *v.* Raymond, 6 Pet., 218; Daniel *v.* Railroad Company, 3 Wall., 255).

Daniel *v.* Railroad Co., 3 Wall., 250, is relied on to

support the contention that the entire case has been brought to this court. In that case not only a statement of facts proved, but the testimony of the witnesses was certified up. Of course the case was dismissed.

Numerous authorities are cited by counsel in support of the well-settled question that this court has refused to entertain jurisdiction when the whole case is presented by the certificate of division of opinion. The decisions of this court on this point were reviewed by Mr. Justice Gray in Jewell *v.* Knight, 123 U. S., 433, and the rule announced that "the whole case, even when its decision turns upon matters of law, can not be sent up by certificate of division."

We apprehend it will not be insisted that this accepted rule comes in conflict with, or overrules, the doctrine in United States *v.* Chicago, *supra*, which holds that the whole case may be disposed of by this court by its decision on what is certified. Under one of the rulings this court refuses jurisdiction because the whole case is certified. Under the other, if a point of law is properly certified, this court will entertain jurisdiction, and, regardless of the number of questions, if they are all to the same point, decide the point so certified, although in doing so it disposes of the whole case. We claim that the case now under consideration comes within the latter rule.

In the case at bar the judges have certified to this court a distinct legal point, with sufficient facts set forth to show its bearing upon the parties. This complies with the rule in Havemeyer *v.* Iowa County, 3 Wall., 294, 304. The court, in that case, refused to answer one of the questions because no facts were set forth. The cases of Ogilvie *v.* Insurance Co., 18 How., 577, 581, and United States *v.* Bank of Columbus, 19 *Ib.*, 385, were dismissed for the same reason.

The decisions are also cited in Jewell *v.* Knight, *supra*,

upon the point that questions of law only must be certified, and not questions of fact or mixed questions of law and fact. There is no question of fact or of mixed law and fact presented by the certificate here. It is admitted that but one question is involved, namely, whether Hambly and the conductor and engineer were fellow-servants of the Northern Pacific R. R. Company. Sufficient facts have been set forth to show the capacities in which they were employed, and to fix the misconduct and negligence at the time the injury was incurred by Hambly. The court is simply put in possession of facts upon which it can determine whether or not the employés mentioned were fellow-servants. Whether they were such fellow-servants or not is a distinct legal point which depends upon the facts, but, in reaching a decision here, it is not necessary to decide a question of fact, or a mixed question of law and fact.

There is no such question of fact here as was presented in Daniels *v.* Railroad Company, 3 Wall., 250, where this court was asked to find whether the plaintiff was "a passenger or a servant of the defendant." In the case at bar the capacity in which Hambly and the conductor and engineer were employed by the railroad company is fixed, and not certified to this court to be passed upon. They were all employed by the plaintiff in error. Upon these facts the court below was requested to instruct the jury that Hambly and the conductor and engineer were fellow-servants, and to return a verdict for the defendant, but the judges were opposed in their opinions, and have made this the ground of the first question. It is clear that this question presents a distinct legal point, founded upon sufficient facts. The answer to it will not involve any question of fact, or mixed law and fact, but will simply determine whether the employés named were or were not fellow-servants.

We pass by the second question for reasons above stated.

The third question presents the same distinct legal point as the first, and differs from it only in having sufficient facts stated in the body of the question itself to sustain the legal point presented. It will hardly be objectionable for this reason. If United States *v.* Briggs, 5 How., 208, 210, were followed, this would probably be regarded as the proper way to state the question.

So, if the court shall consider the three questions certified together, there is but one legal point presented. If they are considered separately the same point alone is involved. The question, no matter how considered, is whether Hambly, the conductor, and engineer were fellow-servants. The employment, services, relations, and negligence of the parties are sufficiently set forth to enable the court to determine this legal point. If all had been set forth that is contended for by counsel for defendant in error, no doubt he would have moved to dismiss because we had brought up the whole case. If we had set forth no facts, then, of course, the motion would have been made to dismiss. But we think we have struck the happy medium, with sufficient facts certified, upon which the only legal point involved in the case may be determined.

Our contention is at this time, and will be hereafter if this case is reached upon its merits, that Hambly was a fellow-servant, at the time he received the injury, not only of the engineer, but also of the conductor. We shall hope to sustain this position by the weight of the authorities. For the present we simply ask the court's attention to an alphabetical list of occupations, where it has been decided who are, and who are not, fellow-servants (7 Am. & Eng. Encyc. of L., 864, *et seq.*)

As to the fourth reason assigned, we would merely remark, the points presented by the certificate of division are couched in plain, clear, and forcible words that need no parsing or interpretation. They can not fail to be

understood. And to say they are not coupled with sufficient facts, upon which their solution depends, is a mistake of counsel, as the record shows. Quite sufficient and just enough facts to show their pertinency to the case are set forth, and this is what is required in all cases. But this position of counsel is in the teeth of his own argument, that we are placing before the court too many facts, and this difference we leave to the court to reconcile, insisting as we do, questions of law solely are presented, with facts enough to show their applicability, and no more, and this gives the court jurisdiction.

See to Conk. Treat. (4th ed.), 75 and 76. In this work, page 851, is given the form of certificate in such cases as this, which was drawn up under the direction of Chief-Justice Marshall, and it will be seen in comparison the certificate here accords with that form in all essential particulars.

A. H. GARLAND,
H. J. MAY,
For Plaintiff in Error.

15-4 2 5 3 4 9

Office Supreme Court U. S.
FILED.
DEC 4 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1893.—No. 187.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

GEORGE HAMBLY.

In Error to the Circuit Court of the United States for the District Court of North Dakota.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES McNAUGHT,
A. H GARLAND, and
H. J. MAY,
Attorneys for Plaintiff in Error.

Press of McGILL & WALLACE, 1107 E Street N. W.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

GEORGE HAMBLY.

No. 187.

In Error to the Circuit Court of the United States for the District Court of North Dakota.

BRIEF FOR PLAINTIFF IN ERROR.

Before entering upon the discussion of the merits of this controversy, it may be well to state that heretofore defendant in error moved to dismiss this writ of error for the want of jurisdiction on account of the defect in certifying the questions to this court, but this motion was denied, and we suppose now the case is before the court on those questions alone, and we will proceed to their consideration.

This cause was brought to recover damages for a personal injury sustained by defendant in error while in the employ of the railroad company. It was tried by the circuit and district judges, and comes to this court upon a certificate of division of opinion. It appeared upon the

trial that the defendant in error was a common laborer, and at the time he was injured was engaged, under the superintendence of a "boss," or foreman, in constructing or repairing a culvert upon the line of the company's railroad. While thus employed upon the track he was struck and injured by the locomotive of a moving passenger train upon the railroad. (Rec., 23–'5.)

The injury received by the defendant in error was caused solely by the negligence and misconduct of the conductor and engineer in charge of the passenger train. (Rec., *sup.*)

The plaintiff in error contended that Hambly and the conductor and engineer of the passenger train were fellow-servants under both the common law and the statute of North Dakota, which latter is as follows:

"An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee."

Section 3753, Comp. Laws of Dak.

The errors assigned upon this writ of error are based, first, upon the court's charge to the jury that defendant in error and the persons in charge of such passenger train were not fellow-servants in such a sense as would exempt the company from liability for the negligent acts of such persons; second, upon the court's refusal to charge the jury that such persons and the defendant in error were co-servants.

The propositions upon which the circuit court asks for light to be shed by this court, as stated in the Record, are these:

"1st. Whether, on the admitted facts of this case hereinbefore set out, the jury should have been instructed

that the plaintiff and said conductor and engineer were fellow-servants, and that they should return a verdict for the defendant.

"2d. Whether, on the facts hereinbefore set out, the court should have set aside the verdict and judgment in the case and granted defendant a new trial.

"3d. Whether the plaintiff, who was a common day laborer in the employ of the defendant (which is a railroad company owning and operating a line of railroad) and who was at the time he received the injury complained of working for the defendant under the order and direction of a section "boss" or foreman on a culvert on the line of defendant's road, was a fellow-servant with the engineer and conductor operating and conducting a passenger train on the defendant's road in such a sense as to exempt the defendant from liability for an injury inflicted on the plaintiff by and through the negligence of said conductor and engineer in moving and operating said passenger train." (Rec., 25.)

It will thus be observed, that the single question here presented for determination, is the relationship which the engineer and conductor of the passenger train bore to the defendant in error. Did their common employment by the plaintiff in error bring them together in such a way that they were fellow-servants under the statute already cited?

The Supreme Court of Dakota has construed the section of the statute above quoted in a well-considered opinion (Elliott v. C. M. & St. P. R. R. Co. (Dak.), 41 N. W. Rep., page 758). In that case the plaintiff, who was the foreman of a section gang, was injured through the negligence of the conductor of a train, thus presenting for determination the precise point involved in this appeal. The court held, relying largely upon the authority of Randall v. B. & O. R. R., 109 U. S., 483, that the plaintiff and negligent conductor were fellow-servants within the statute.

While it is true that the section quoted comprises, in

substance, the well-settled principles of the law respecting the employer's exemption from liability for the neglect of one servant resulting in the injury of another, the application of the statute, its limitation or expansion, made to exclude or cover persons holding certain defined relations to each other, is entitled to greater weight when made by the highest court of the State or Territory possessing such statute than if proceeding from some other court. The Elliott case distinctly decided, that under the statute quoted persons holding the same relative position to each other as that sustained by the engineer and Hambly in this case were fellow-servants within the statute. This stands as the adjudicated construction of said statute in Dakota, and unless it appears that the same is wholly unsustained by the authorities, or is against the weight of authority, it ought not to be disturbed by this court. While the Federal courts are not bound by the decisions of State courts upon questions of general law, nevertheless such decisions are entitled to the highest respect.

Boyce *v.* Tabb, 18 Wall., 546;
Chicago, &c., R. R. *v.* Robbins, 2 Black, 418;
Rich *v.* Mentz, 134 U. S., 632.

The case of Randall *v.* Baltimore & O. R. R. Co. (*supra*), is directly in point, and is the earliest case decided by this court in which it became necessary to define who are fellow-servants in such a sense as to exempt the master from liability for injury received by one servant through the negligence of another. Randall was a brakeman, whose duties also required that he should throw certain switches by means of which the freight train, in the movement of which he was employed, was transferred from one track to another. While thus engaged he was struck and injured by the careless and negligent management of another engine

upon an adjacent track. This court held that by the great weight of authority, both American and English, the engineer of the locomotive which did the injury was a fellow-servant with the plaintiff, and that the master was not liable.

The grounds upon which the decision rested were concisely stated by the court as follows:

"Nor is it necessary for the purpose of this case to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several States; because persons standing in such relation to one another as did this plaintiff and the engineman of the other train, are fellow-servants, according to the very great preponderance of decisions in the House of Lords, and in the English and Irish courts. They are employed and paid by the same master. The duties of the two bring them to work at the same place, at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object—the moving of trains. Neither works under the orders or control of the other. Each, by entering into his contract or service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence against the corporation, their common master."

It is difficult to see how any distinction can be drawn between the principles underlying the Randall case and those which must govern the decision of the case at bar. Hambly was at the time he received his injury employed upon the track in repairing a culvert over which the trains of the railroad company necessarily passed. His injury was caused by the negligent manner in which one of those trains was operated and run at the place where he was hurt. The performance of his duty as a section hand in repairing the culvert brought him to work at the same place and at the same time that the movement of the passen-

ger train brought those in charge of it. Each in performance of his respective duties was at the same place at the same time. The duties which they owed to each other were, within certain limits, reciprocal. That of Hambly consisted in so conducting himself on and about the culvert and in his work upon the same, that the engine might pass safely over, and generally in the performance of his work to commit no act of negligence which would imperil the safety of the engineer in charge of the train. The duty of the engineer was to run his train prudently and carefully so as not to injure those engaged in repairing the track. The cases are numerous in which it has been held that an engineer or fireman, injured by the negligence of a switchman in throwing a switch, can not recover from the master, for the reason that the culpable engineer and the person injured are fellow-servants.

Farwell *v.* Boston, &c., R. R., 3 Metc. (Mass.), 49;
Harvey *v.* R. R. Co., 88 N. Y., 481.

It may, indeed, be said that as Hambly had to do with repairing the track and keeping it in a fit condition for the passage of trains, his negligence would be that of the master, upon the well-established principle that the latter is bound to furnish safe tools, appliances, etc., for his servants, and can not escape liability by delegating such duty to a subordinate. But the supposed default of Hambly was one which was outside of this rule, and pertained to the performance of no absolute duty which the master owed to his employés. It is true the duties of Hambly and those of the engineer were different in character, but their object was the accomplishment of a common end—the transportation of persons and property over a line of railroad owned and operated by their common master.

This object was facilitated by the keeping of the track

and culvert in repair, a part of Hambly's duty, equally with the actual movement of trains. The two men were employed by the same employer, were working at the same time, near the same place, and in the same business.

It is not pretended that the engineer and conductor were not competent, or that the company was guilty of any lack of care in their selection and retention.

The case of Ross *v.* C. M. and St. P. R. R., 112 U. S., 377, is largely relied upon as furnishing the law of this case. That case was decided by a divided court, and the doctrine announced is generally conceded to be in conflict with the weight of authority of other tribunals, both English and American.

McKinley on Fellow Servants, 164;
20 Cent. Law Journal, 86.

17 A. and E. R. R. cases, page 514, where the authorties upon this subject are annotated and discussed. But though the Ross case remains undisturbed and the principles therein enunciated continue unshaken, it is difficult to see how the case at bar can be brought within its reach. Ross was the engineer of the train controlled by the negligent conductor. It was found as one of the facts of the case that the conductor was in full control and was alone responsible for the management of the train. He stood in the shoes of his principal and as his representative. He was under these circumstances declared to be the vice-principal, and Ross, the injured engineer, as an inferior servant assisting in the movement of the train, was acting under his orders and subject to his directions. The relation between the conductor and Ross was, therefore, that of vice-principal and servant, the latter working under the former's directions.

This court held the master liable for the negligent manner in which its vice-principal discharged his duty

to Ross. But what analogy is there between the principle thus laid down and the one here involved?

Hambly was in no sense acting under the direction or subject to the control of those in charge of the train. He was a common laborer upon the track, engaged in repairing a culvert, and was under the control of a section "boss," or foreman. The relation, therefore, which subsisted between Ross and the conductor, and which alone furnished the basis for the decision in that case, never existed between Hambly and those in charge of the train which inflicted the injury upon him.

The Ross case has been variously construed by the different courts which have discussed and followed or rejected its doctrine. By no fair construction, either of its language or its reasoning, can it be considered as carrying the doctrine of the master's liability for a vice-principal's neglect to any greater length than to cover the injuries inflicted upon those holding to such vice-principal the relation of inferior servant.

The case of Howard *v.* Denver and Rio Grande R. R., 26 Fed. Rep., 837, presented the following facts:

A fireman upon a passenger train was injured by a collision occasioned by the negligence of the engineer of another engine running in the opposite direction upon the same road. The opinion is by Justice Brewer, who heard and determined the motion for a new trial. It was contended that the decision in the Ross case was broad enough to cover the negligence of the culpable engineer. The learned judge held differently.

The closing sentence of Justice Field's opinion in the Ross case is as follows: "And with respect to the negligence of the conductor of the gravel train, no instruction was given or requested." It is apparent, therefore, that the opinion in that case can not be enlarged or expanded to cover injuries inflicted by others than those sustaining the relation of vice-principal to the person injured.

In Howard *v.* Denver R. R. (*supra*), the court, after stating the *Farwell Case* (*4 Metc., 49*), proceeds to discuss the different limitations which modern jurisprudence has grafted upon the fellow-servant doctrine of exemption from liability enunciated in that case. The first one is now universally conceded to be just, and is supported by authority of great weight, viz.: That the master can not escape liability by delegating to another the performance of duties which are personal to himself, and which he owes absolutely to his servant.

N. P. R. R. *v.* Hebert, 116 U. S., 642;
Hough *v.* R. R. Co., 100 U. S., 213;
Flike *v.* Boston & Albany R. R., 53 N. Y., 549;
Mullan *v.* Philadelphia R. R., 78 Pa. St., 25.

Another limitation is that recognized by the Ross case, where the offending servant has been placed in entire control of a separate department of the master's work, in which case his acts of negligence in respect to the servants working under his immediate control and supervision are deemed to be those of the master himself.

R. R. *v.* Ross (*supra*);
R. R. *v.* Fort, 17 Wall., 553;
Chicago R. R. *v.* Bayfield, 37 Mich., 205;
Malone *v.* Hathaway, 64 N. Y., 5;
Laning *v.* R. R., 49 N. Y., 521.

Another exception which some courts have sought to establish is that of superior and inferior servants, in which the master having established grades of service and placed some in control of others, is held liable for all the acts of negligence of the former which result in injury to the latter. This is known as the Ohio and Kentucky doctrine, and, as Judge Dillon has remarked, has produced endless confusion in those States.

See article by Judge Dillon on American law concerning employer's liability.

24 Am. Law Rev., p. 175.

The only other important modification is that which has grown out of the attempt of some courts to adopt the doctrine of consociation or the different department limitation. The doctrine is an exceptional one.

2 Thompson on Negligence, 1026.

It has been recognized in Illinois and some of the Southern States.

Chicago R. R. *v.* Moranda, 93 Ill., 302.

The great weight of authority is opposed to the adoption of this limitation.

Wright *v.* N. Y. C. R. R., 25 N. Y., 562;
Texas R. R. *v.* Harrington, 62 Tex., 597;
St. Louis R. R. *v.* Welch, 20 S. W. Rep., 529;
Holden *v.* Fitchburg, 129 Mass., 268;
Broduer *v.* Valley Falls Co. (R. I., 1889), 17 Atl. Rep., 54;
N. Y. R. R. *v.* Bell, 112 Pa. St., 400;
Keystone Bridge Co. *v.* Newbury, 96 *Id.*, 246;
Kirk *v.* Atlanta R. R., 94 N. C., 625;
Baltimore Elev. Co. *v.* Neal, 65 Md., 438;
Quincy Mining Co. *v.* Kitts., 42 Mich., 34;
Lindwall *v.* Woods (Minn., 1889), 42 N. W. Rep., 1020;
Gormley *v.* Ohio R. R., 77 Ind., 31.

This court has recently and emphatically denied the application of this doctrine in a case, in which a liability was sought to be imposed upon the master for injuries resulting to a servant in one department, as the consequence of the negligence of another servant in another department.

Quebec S. S. *v.* Merchant, 133 U. S., 375.

And it will be remembered by the court that in this case the plaintiff was a stewardess on a ship, and received her injuries as the result of the negligence either of the porter, who was engaged in the same department with

plaintiff, or of the carpenter, who was engaged in a different department of work upon the vessel. The court said that neither the porter nor the carpenter had any authority over the plaintiff, and that they must both be regarded as her fellow-servants; that there was nothing in the employment or service of the carpenter or the porter which made either of them any more the representative of the defendant than the employment and service of the stewardess made her such a representative.

Following the reasoning of this decision, the most recent save one made by this court upon the point in controversy, upon what principle can it be claimed that those in charge of the passenger train were not fellow-servants with Hambly? Hambly did not have any authority over them; nor did they have any authority over him; there was nothing in the service or employment of the engineer which made him any more the representative of the company than the service and employment of Hambly made him such a representative. There was no negligence on the part of the company. The accident was due to no defect in the track, the locomotive engine, or in any of the appliances furnished by the company; nor is it pretended that the company was at fault in employing the persons who were in charge of the passenger train. Their competency and fitness, not being denied, stand confessed. They exercised no control over Hambly, and were no more representatives of the company with respect to him than he was with respect to them.

Under the Ross case, if clothed with like authority, the conductor might have represented the company as to his engineer or fireman, but not as to other employés not on his train and not under his control.

McHaig *v.* R. R., 42 Fed., 291;
Howard *v.* R. R., 26 *Id.*, 837;
Van Wickle *v.* R. R., 32 Fed. Rep., 278;
Quin *v.* N. J. L. Co., 23 *Id.*, 363.

"The master owes certain defined, personal, unalienable, non-assignable duties toward his servants. These duties may be devolved on others by the master, but not without recourse on him.

"In the general American law the doctrine of vice-principal exists to this extent, and no further: that it is precisely commensurate with the master's personal duties toward his servants; as to these, the servant who represents the master is what we may for convenience call a vice-principal, for whose acts and neglects the master is liable. Beyond this the master is liable only for his own personal negligence. This is plain, sound, safe, and practicable line of distinction. We know where to find it and how to define it. It begins and ends with the personal duties of the master. Any attempt to refine, based upon the notion of 'grades' in the service or, what is much the same thing, distinct 'departments' in the service (which departments frequently exist only in the imagination of the judges and not in fact), will only breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the judges that made it seem to be able to 'find no end in wandering mazes lost.'

"The real inquiry is: Was the injury caused by another servant one of the ordinary risks of the particular employment? If so, the grade, whether higher, lower, or co-ordinate, or the department of the faulty servant, is of no consequence.

"It is a condition of the contract of service, that the servant takes upon himself the risk of accidents in the common course of the business, all open and palpable risks, including the negligence of all fellow-servants of whatever grade in the same employment."

Judge Dillon's article (*supra*).

This statement of the test of fellow service is sustained by the following authorities:

Crispin *v.* Babbitt, 81 N. Y., 516;
Cosker *v.* Railroad, 84 *Id.*, 77;
Brick *v.* Rochester Railroad, 98 *Id.*, 211;
Loughlin *v.* State of New York, 105 *Id.*, 159;
Hussey's Case, 112 *Id.*, 614;
McKinnon *v.* Norcross, 149 Mass., 533;
Lindwall *v.* Woods (Minn.), 42 N. W. Rep., 1020;
Quinn *v.* Lighterage Co., 23 Fed., 363;
Mealman *v.* U. P. R. R. Co., 37 Fed. Rep., 189.

The case of Garrahy v. Railroad, 25 Fed. Rep., 258, is squarely in conflict with Randall v. The Baltimore & Ohio R. R. (*supra*). Pike v. Chicago & Alton R. R. Co., 41 Fed., follows the Garrahy case as being the law of the eighth circuit.

The case of Howard v. Delaware and Hudson Canal Co., 41 Fed. Rep., p. ——, involves the precise point at issue in the Hambly case. The plaintiff's intestate was a trackman on the railroad and was killed by the negligence of those in charge of a train. The court held, upon the supposed authority of the Ross case, that those in charge of the train were not fellow-servants with the deceased.

The editor of the American and English Railroad Cases, commenting upon the opinion in the Howard case (*supra*), uses the following language, which is quoted as applicable to the principles involved in this appeal:

"The substance of the court's argument is found in the sentence: 'If the company is responsible to trainmen for the negligence of those in charge of the track, that it should be held responsible to trackmen for the negligence of those in charge of its trains would seem to directly follow.'

"With all due respect to the learned and eminent judge, we beg to say that it does not follow at all, and this for reasons perfectly sound. A railroad company is held responsible for injuries to trainmen caused by the negligence of track hands in failing to keep the track and road-bed in a suitable condition, for the reason that the law implies a contract on the part of the master to provide the servant with machinery and appliances adequately safe for use. The track and road-bed of a railroad are among such appliances. Therefore, when the company delegates the duty of seeing that these are kept in safe and suitable condition to section men, track walkers, etc., they become the representatives of the company, its vice-principals.

"McKinley on Fellow Servants, sec. 29, p. 139.

"But this rule has not the least application when the

conditions are reversed. The employés running the train do not exercise any of the personal functions of the master, and they have delegated to them none of the duties which the company contracts with its servants to perform with reasonable care. The engineer's duty, to keep a lookout, to run at a proper rate of speed, and to give proper signals so as to avoid injuring track hands, is not different in its character from any of the ordinary duties imposed upon railroad servants. If the company is held liable for their negligent performance, the fellow-servant rule is nullified.

"But the court pins its faith to the case of Chicago, M. & St. P. R. R. Co. *v.* Ross, 112 U. S., 377. That decision has been made to do duty ever since it was decided in the way of supporting fallacious arguments on this question of co-service. It is not surprising, then, that the court in the present instance attempts to find some support in it. The only point decided in the Ross case was that the negligence of the conductor of a railway train is, as regards other train hands, the negligence of the company. Justice Field, in his opinion, expressly limited the decision to this narrow point. The deduction from this case of what he considers support is accomplished by Judge Wheeler in these words: 'Trackmen are no more co-laborers with trainmen than the trainmen of one train are with those of another train on the same road, and not so much so as trainmen of the same train are. Those in charge of this train were placed there and clothed with that authority by the defendant. They acted for the defendant in the exercise of the control given them over the movements of the train; and their negligence in that behalf appears, according to this decision of the Supreme Court of the United States, to be the negligence of the defendant.' No one questions the assertion that the trainmen control the movements of the train and that they are placed on the train for that purpose. But does the eminent judge intend to assert as a principle of law that any employé who controls the operation of any machinery or appliance which the master places in his hands, is a vice-principal as regards any other employé who may be injured by his negligence? If the principle applies to train hands, it applies to all other employés controlling appliances of the master. As

an illustration, if, in the shops of a railroad company, a servant employed at the anvil should negligently strike a co-laborer with his hammer, they could not be considered fellow-servants under the common law rule, for the wielder of that hammer was 'placed' at that anvil and 'clothed with authority' to swing his hammer by the company. He acts for the company 'in the exercise of the control given him over the movements of the' hammer, and 'his negligence in that behalf' would equally appear under this argument, 'according to the Supreme Court of the United States, to be the negligence of the' company. But in truth, the decision of the National Supreme Court, however erroneous it may be, was never intended to sanction any such absurd doctrine. It does not furnish the least support for the decision in the principal case, which must be ranked as another of those efforts to soften the so-called rigor of the law at the expense of an accurate judgment."

Note to Howard *v.* R. R. (*supra*), 41 A. & E. R. R. Cases, 477.

The running of trains upon its railroad in such a way as not to injure other servants at work on or about its track, is not an absolute duty which the master owes to its employés. Such a requirement can not rightfully be classed under any of the exceptions to the fellow-servant rule, unless it be that of the different department limitation; and, as we have already seen, this court in the case of Quebec S. S. Co. *v.* Merchant (*supra*) has seemingly disapproved of that doctrine.

With respect to Hambly, the railroad had discharged every duty which it owed him, as the appliances of every character were in perfect order and the persons in charge were competent. It could no more be present upon the engine, to manage it carefully and prudently, than it could warrant him against the negligent use of a pick or shovel by a fellow-trackman.

The true test in all cases as to whether the negligent servant is a vice-principal is, was the act with respect to

which he was negligent one which he was employed to do for and in place of the master.

Curtis *v.* Granitville M'f'g Co., 18 S. C., 362;
Shearman & Redfield on Neg., sec. 1041.

If Judge Dillon's statement of the test of fellow service and vice-principal be correct, and the same be determined not by the grade, rank or department of the faulty servant, but by the character of the act out of which the injury flows, we shall find a ready and easy solution of the question presented in this contest.

The matter resolves itself into the simple inquiry whether the negligent use of a perfectly constructed engine, by competent persons in charge, upon a track in perfect repair, is to be adjudged the violation of any "personal, inalienable, non-assignable duty," which the company owed to Hambly. None of the exceptions to the rule in Farwell's case (save these made in the departmental limitation in Illinois and certain Southern States already referred to, and in Iowa and Kansas where the fellow-servant rule has been abolished by statute) would support an affirmative answer. To hold the master liable for the negligent use of perfectly safe machinery in the hands of competent servants, would revolutionize the whole doctrine of the former's liability to his servant for the laches or torts of his fellows, and would place such liability on an equality with that which governs common carriers with respect to injuries inflicted by them upon their passengers.

"Such a construction would make any negligent misplacement of a switch, any negligent collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a safe place. The true idea is that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that no negli-

gent handling by an employé of the machinery shall create danger."

Judge Brewer in Howard *v.* Denver R. R., 26 Fed., 837.

"If the place where the plaintiff was injured was unsafe only because of negligence in the management of the cars, that is simply the case of danger and injury caused by the wrongful conduct of fellow-servants."

Connolly *v.* Minneapolis R. R. Co., 35 N. W. Rep., 583.

The following is a partial list of cases in which it has been held that an engineer was a fellow-servant with a laborer upon the track:

Vick *v.* R. R., 95 N. Y., 267;
Easton *v.* R. R., 32 Fed., 893;
Clifford *v.* R. R., 141 Mass., 564;
R. R. *v.* Welch (Tex.), 10 S. W. R., 529;
Collins *v.* R. R., 30 Minn., 31;
Van Wickle *v.* R. R., 32 Fed., 278;
Flagundes *v.* R. R. (Cal.), 21 Pac. R., 437;
R. R. *v.* Wachter, 60 Md., 395;
R. R. *v.* Shackelford, 42 Ark., 417;
Buckley *v.* Gould, 14 Fed., 833;
Wood *v.* New Bedford, 12 Mass., 252;
Connolly *v.* Minneapolis R. R., 35 N. W. R., 583;
Schultz *v.* R. R., 67 Wis., 616; and see list of occupations, in *7 Am. & Eng. Ency. L., 864, et seq.*

The case of Gormley, Admr., *v.* Ohio & M. R. R. Co., 72 Ind., is an exact parallel to Hambly's case. Plaintiff's intestate was a track hand, injured by the negligent manner in which a freight train was run upon the railroad where he was employed. The court held, citing and following other Indiana decisions, that the relationship of fellow-servants existed between deceased and the faulty engineer, and the plaintiff could not recover.

See also:

Slater *v.* Jewett, 84 N. Y., 61;
Ryan *v.* Cumberland R. R., 23 Pa. St., 384,
Blake *v.* Maine Central R. R., 70 Me., 60;
Ohio R. R. *v.* Collarn, 73 Ind., 261; 38 A. R., 134;
Whalen *v.* Mad River, etc., 8 Ohio St., 249;
Chicago R. R. *v.* Keefe, 47 Ills., 108;
Bolt *v.* N. Y. Cent. R. R., 18 N. Y., 432;
Sullivan *v.* M. & M. R. R., 11 Iowa, 421.

That Hambly, injured in the service as a trackman, must be presumed to have taken all the ordinary risks of the employment, including the risks of accidents happening by the negligent acts or omissions on the part of other servants engaged in the same undertaking, is a proposition so well established as to require no authorities to be cited in its support.

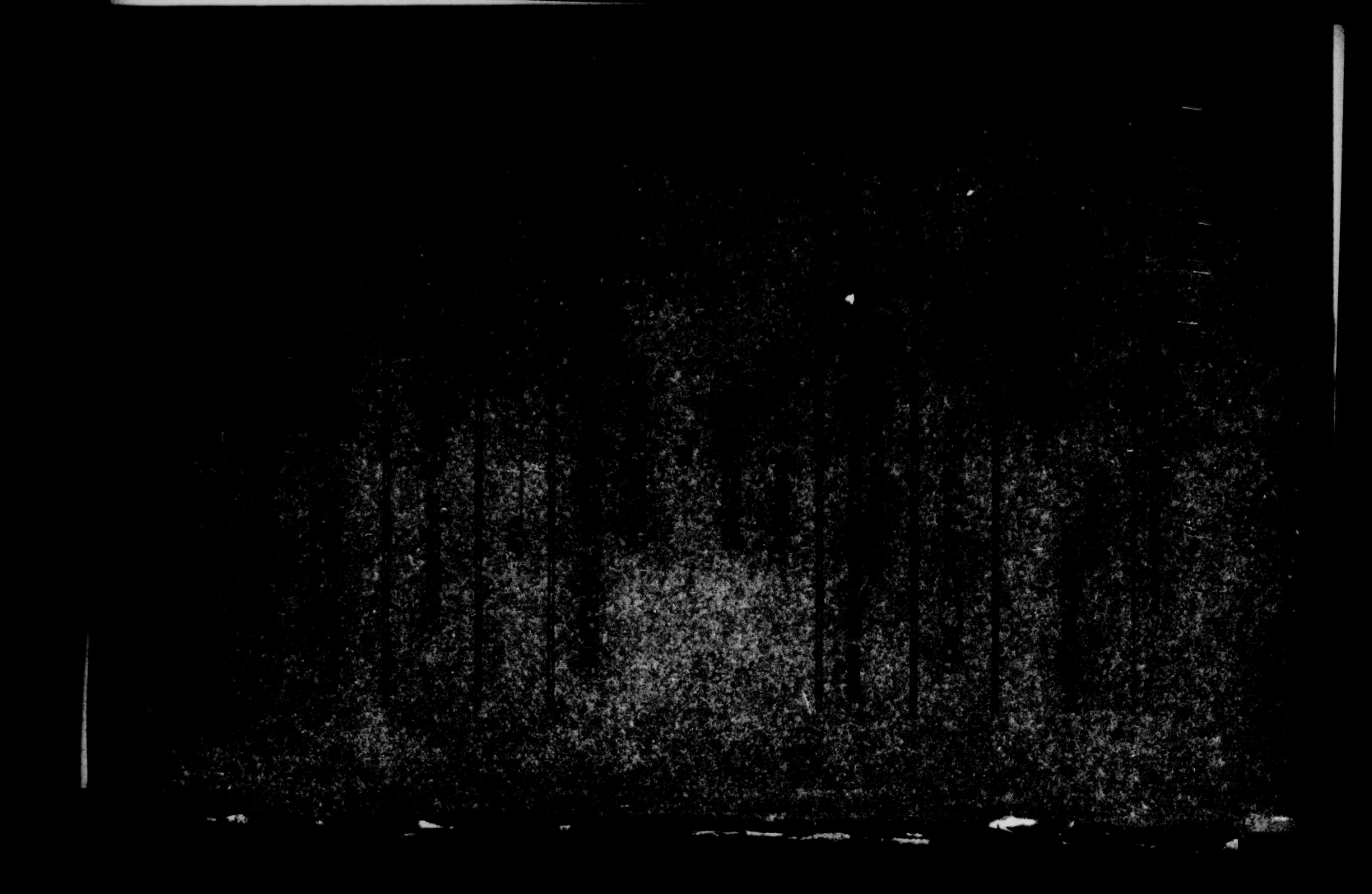
R. R. Co. *v.* Herbert, 116 U. S., 642 and 647;
Randall *v.* B. & O. R. R., 109 U. S., 483.

The stern and earnest combat that seemed to have arisen if not raged in this court in getting rid of the case of *B. & O. Railroad* v. *Baugh, 149 U. S., 368,* was not incited by any question touching the doctrine of *fellow-servants* in itself, but by the question of whether *the general law,* or the law of the particular State or Territory, should determine the relations existing between "*fellow-servants,*" the majority of the court holding the *general law* should control. And it is quite certain whether the *general law* or the statute law of Dakota is to control here, Hambly has made out no case. We have already seen the Dakota law is against him, and the *general law* as expounded in *Baugh's case, supra,* is specially against him.

Hambly voluntarily undertook a service, which of itself placed him in a position of danger, where incessant vigilance alone could protect him from injury from the

operation of the company's trains; while he was engaged upon the track and in the repair of the culvert, trains of the company were continually passing over the road, thus furnishing him hourly with fresh reminders of danger. Under all these circumstances he voluntarily entered upon and continued in the service until he received his injury; and we think he thereby assumed the risks of accident occasioned by the negligence of another servant in the employment of the common master, and therefore not entitled to recover in this proceeding.

JAMES MCNAUGHT,
A. H. GARLAND, and
H. J. MAY,
Attys. for Plaintiff in Error.



IN SUPREME COURT OF THE

UNITED STATES.

October Term, 1890.

NORTHERN PACIFIC RAILROAD COMPANY,

Plaintiff in Error,

vs.

GEORGE HAMBLY,

Defendant in Error.

STATEMENT OF FACTS.

This cause was brought to recover damages for a personal injury sustained by defendant in error while in the employ of the R. R. Co. It was tried at the Circuit by the Circuit and District Judges and comes to this court upon a certificate of division of opinion of said Judges. It appeared upon the trial that the defendant in error was a common laborer and at the time he was injured, was engaged under the superintendence of a "boss," or foreman, in constructing or repairing a culvert upon the line of the

Company's railroad. While thus employed upon the track, he was struck and injured by the locomotive of a moving passenger train upon the railroad.

The injury received by the defendant in error was caused solely by the negligence and misconduct of the conductor and engineer in charge of said passenger train.

The plaintiff in error contended that Hambly and the conductor and engineer of said passenger train were fellow servants under both the common law and the statute of North Dakota, which latter is as follows:

"An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee."

Section 3753 Comp. Laws of Dak.

The errors assigned upon this appeal are based: First, Upon the court's charge to the jury that defendant in error and the persons in charge of such passenger train were not fellow servants in such a sense as would exempt the Company from liability for the negligent acts of such persons. Second, Upon the court's refusal to charge the jury that such persons and the defendant in error were co-servants.

ARGUMENT.

It will thus be observed that the single question here presented for determination, is the relationship which the engineer and conductor of the passenger train bore to the defendant in error. Did their common employment by the plaintiff in error bring them together in such a way that they were fellow servants under the statute already cited?

In the discussion of this proposition we propose to examine some of the decisions rendered in cases similar to the one at bar.

And first, the Supreme Court of Dakota, has construed the section of the statute above quoted in a well considered opinion. (Elliott vs. C. M. & St. P. R. R. Co., (Dak.) 41 N. W. Rep. page 758.) In the case cited, the plaintiff, who was the foreman of a section gang, was injured through the negligence of the conductor of a train, thus presenting for determination the precise point involved in this appeal. The court held, relying largely upon the authority of Randall vs. B. & O. R. R., 109 U. S. 483; that the plaintiff and negligent conductor were fellow servants within the statute.

While it is true that the section quoted comprises in substance the well settled principles of the law respecting the employers exemption from liability for the neglect of one servant resulting in the injury of another, the application of the statute, its limitation or expansion, made

to exclude or cover persons holding certain defined relations to each other, is entitled to greater weight when made by the highest court of the State or Territory possessing such statute, than if proceeding from some other court. The ELLIOTT case distinctly decided that under the statute quoted persons holding the same relative position to each other as that sustained by the Engineer and Hambly in this case, were fellow servants within the statute. This stands as the adjudicated construction of said statute in Dakota, and unless it appears that the same is wholly unsustained by the authorities, or is against the weight of authority, it ought not to be disturbed by this court. While the Federal Courts are not bound by the decisions of State Courts upon questions of general law, nevertheless such decisions are entitled to the highest respect.

Boyce vs. Tabb, 18 Wall, 546.

Chicago, &c. R. R. vs. Robbins, 2 Black, 418.

The case of Randall vs. Baltimore & O. R. R. Co. (Supra.) is directly in point and is the earliest case decided by this court in which it became necessary to define who are fellow servants in such a sense as to exempt the master from liability for injury received by one servant through the negligence of another. Randall was a brakeman, whose duties also required that he should throw certain switches by means of

which the freight train, in the movement of which he was employed, was transferred from one track to another. While thus engaged, he was struck and injured by the careless and negligent management of another engine upon an adjacent track. This court HELD that by the great weight of authority, both American and English, the engineer of the locomotive which did the injury was a fellow servant with the plaintiff and that the master was not liable.

The grounds upon which the decision rested were concisely stated by the court as follows: "Nor is it necessary for the purpose of this case to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several States; because persons standing in such relation to one another as did this plaintiff and the engineman of the other train, are fellow servants, according to the very great preponderance of decisions in the House of Lords, and in the English and Irish courts. They are employed and paid by the same master. The duties of the two bring them to work at the same place, at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object — the moving of trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in

performing his service; and neither can maintain an action for an injury caused by such negligence against the corporation, their common master."

It is difficult to see how any distinction can be drawn between the principles underlying the Randell case and those which must govern the decision of the case at bar. Hambly was at the time he received his injury employed upon the track in repairing a culvert over which the trains of the R. R. Co. necessarily passed. His injury was caused by the negligent manner in which one of those trains was operated and run at the place where he was hurt. The performance of his duty as a section hand in repairing the culvert brought him to work at the same place and at the same time that the movement of the passenger train brought those in charge of it. Each in performance of his respective duties was at the same place at the same time. The duties which they owed to each other were, within certain limits, reciprocal. That of Hambly consisted in so conducting himself on and about the culvert and in his work upon the same, that the engine might pass safely over, and generally in the performance of his work to commit no act of negligence which would imperil the safety of the engineer in charge of the train. The duty of the engineer was to run his train prudently and carefully so as not to injure those engaged in repairing the track. The cases are numerous

in which it has been held that an engineer or fireman, injured by the negligence of a switchman in throwing a switch, cannot recover from the master, for the reason that the culpable engineer and the person injured are fellow servants.

Farwell vs. Boston &c., R. R. 4 Metc. 49.

Harvey vs. R. R. Co., 88 N. Y., 481.

It may indeed be said that as Hambly had to do with repairing the track and keeping it in a fit condition for the passage of trains, his negligence would be that of the master, upon the well established principle that the latter is bound to furnish safe tools, appliances, &c., for his servants and cannot escape liability by delegating such duty to a subordinate. But the supposed default of Hambly was one which was outside of this rule and pertained to the performance of no absolute duty which the master owed to his employees. It is true the duties of Hambly and those of the engineer were different in character, but their object was the accomplishment of a common end — the transportation of persons and property over a line of railroad, owned and operated by their common master.

This object was facilitated by the keeping of the track and culvert in repair, a part of Hambly's duty, equally with the actual movement of trains. The two men were employed by the same employer, were working at the same time, near the same place and in the same business.

It is not pretended that the engineer and conductor were not competent or that the company was guilty of any lack of care in their selection and retention.

The case of Ross vs. C. M. & St. P. R. R., 112 U. S. 377, is largely relied upon as furnishing the law of this case. That case was decided by a divided court and the doctrine announced is generally conceded to be in conflict with the weight of authority of other tribunals, both English and American.

McKinley on fellow servants, 164;

20 Cent. Law Journal 86;

17, A. & E. R. R. cases page 514, where the authorities upon this subject are annotated and discussed. But though the Ross case remain undisturbed and the principles therein enunciated continue unshaken, it is difficult to see how the case at bar can be brought within its reach. Ross was the engineer of the train controlled by the negligent conductor. It was found as one of the facts of the case that the conductor was in full control and was alone responsible for the management of the train. He stood in the shoes of his principal and as his representative. He was under these circumstances declared to be the vice principal and Ross, the injured engineer, as an inferior servant assisting in the movement of the train, was acting under his orders and subject to his directions. The relation between the conductor and Ross was therefore that of vice principal and

servant, the latter working under the former's directions.

This court held the master liable for the negligent manner in which its vice principal discharged his duty to Ross. But what analogy is there between the principle thus laid down and that at stake in the case at bar?

Hambly was in no sense acting under the direction or subject to the control of those in charge of the train. He was a common laborer upon the track, engaged in repairing a culvert and was under the control of a section boss or foreman. The relation, therefore, which subsisted between Ross and the conductor and which alone furnished the basis for the decision in that case, never existed between Hambly and those in charge of the train which inflicted the injury upon him.

The Ross case has been variously construed by the different courts which have discussed and followed or rejected its doctrine. By no fair construction, either of its language or its reasoning, can it be considered as carrying the doctrine of the master's liability for a vice principal's neglect to any greater length than to cover the injuries inflicted upon those holding to such vice principal the relation of inferior servant.

The case of Howard vs. Denver & Rio Grande R. R., 26 Fed. Rep. 837, presented the following facts:

A fireman upon a passenger train was injured by a collision occasioned by the negli-

gence of the engineer of another engine running in the opposite direction upon the same road. The opinion is by Justice Brewer, who heard and determined the motion for a new trial. It was contended that the decision in the Ross case was broad enough to cover the negligence of the culpable engineer. The learned judge held differently.

The closing sentence of Justice Field's opinion in the Ross case is as follows: "And with respect to the negligence of the conductor of the gravel train, no instruction was given or requested." It is apparent, therefore, that the opinion in that case cannot be enlarged or expanded to cover injuries inflicted by others than those sustaining the relation of vice-principal to the person injured.

In Howard vs. Denver R. R. (supra) the court after stating the Farewel case, (4 Metc. 49) proceeds to discuss the different limitations which modern jurisprudence has grafted upon the fellow servant doctrine of exemption from liability enunciated in that case. The first one is now universally conceded to be just, and is supported by authority of great weight, viz: That the master cannot escape liability by delegating to another the performance of duties, which are personal to himself and which he owes absolutely to his servant.

N. P. R. R. vs. Hebert, 116 U. S. 642.
Hough vs. R. R. Co., 100 U. S. P. 213.

Flike vs. Boston & Albany R. R. 53 N. Y. 549.

Mullan vs. Philadelphia R. R., 78 Pa. St. 25.

Another limitation is that recognized by the Ross case, where the offending servant has been placed in entire control of a separate department of the master's work, in which case his acts of negligence in respect to the servants working under his immediate control and supervision are deemed to be those of the master himself.

R. R. vs. Ross (supra).

R. R. vs. Fort, 17 Wall 553.

Chicago R. R. vs. Bayfield, 37 Mich. 205.

Malone vs. Hathaway, 64 N. Y. 5.

Laning vs. R. R., 49 N. Y. 521.

Another exception which some courts have sought to establish is that of superior and inferior servants, in which the master having established grades of service and placed some in control of others, is held liable for all the acts of negligence of the former which result in injury to the latter. This is known as the Ohio and Kentucky doctrine and, as Judge Dillon has remarked, has produced endless confusion in those states.

See article by Judge Dillon on American law concerning employers liability.

24 Am. Law Rev. P 175.

The only other important modification is that which has grown out of the attempt of some

courts to adopt the doctrine of consociation or the different department limitation. The doctrine is an exceptional one.

2 Thompson on Negligence 1026.

It has been recognized in Illinois and some of the Southern States.

Chicago R. R. vs. Moranda, 93 Ill. 302.

The great weight of authority is opposed to the adoption of this limitation.

Wright vs. N. Y. C. R. R., 25 N. Y. 562.
Texas R. R. vs. Harrington, 62 Tex. 597.
St. Louis R. R. vs. Welch, 20 S. W. Rep. 529.
Holden vs. Fitchburg, 129 Mass. 268.
Broduer vs. Valley Falls Co. (R. I. 1889), 17 Atl. Rep. 54.
N. Y. R. R. vs. Bell, 112 Pa. St. 400.
Keystone Bridge Co. vs. Newbury, 96 Id. 246.
Kirk vs. Atlanta R. R., 94. N. C. 625.
Baltimore Elev. Co. vs. Neal, 65 Md. 438.
Quincy Mining Co. vs. Kitts, 42 Mich. 34.
Lindwall vs. Woods, (Minn. 1889), 42 N. W. Rep. 1020.
Gornley vs. Ohio R. R. 77 Ind. 31.

This court has recently and emphatically denied the application of this doctrine in a case in which a liability was sought to be imposed upon the master for injuries resulting to a servant in one department as the consequence of

the negligence of another servant in another department.

Quebec S. S. vs. Merchant, 10 Sup. Ct. Rep. 397, opinion filed Mar. 3, 1890, 133 U. S. 375.

In the case last cited the plaintiff was a stewardess on a ship and received her injuries as the result of the negligence either of the porter, who was engaged in the same department with plaintiff, or of the carpenter who was engaged in a different department of work upon the vessel. The court said that neither the porter nor the carpenter had any authority over the plaintiff, and that they must both be regarded as her fellow servants; that there was nothing in the employment or service of the carpenter or the porter which made either of them any more the representative of the defendant than the employment and service of the stewardess made her such a representative.

Following the reasoning of this decision, the most recent made by this court upon the point in controversy, upon what principle can it be claimed that those in charge of the passenger train were not fellow servants with Hambly? Hambley did not have any authority over them; nor did they have any authority over him; there was nothing in the service or employment of the engineer which made him any more the representative of the Company than the service and employment of Hambly made him such a

representative. There was no negligence on the part of the Company. The accident was due to no defect in the track, the locomotive engine or in any of the appliances furnished by the Company; nor is it pretended that the Company was at fault in employing the persons who were in charge of the passenger train. Their competency and fitness, not being denied, stand confessed. They exercised no control over Hambly and were no more representatives of the Company with respect to him, than he was with respect to them.

Under the Ross case, if clothed with like authority, the conductor might have represented the Company as to his engineer or fireman, but not as to other employees not on his train and not under his control.

McHaig vs. R. R., 42 Fed. 291.
Howard vs. R. R., 26 Id. 837.
Van Wickle vs. R. R., 32 Fed. Rep. 278.
Quin vs. N. J. L. Co., 23 Id. 363.

"The master owes certain defined, personal, unalienable, non-assignable duties toward his servants. These duties may be devolved on others by the master, but not without recourse on him."

"In the general American law, the doctrine of vice.principal exists to this extent and no further: that it is precisely commensurate with the master's personal duties toward his servants; as to these, the servant who represents the mas-

ter is what we may, for convenience, call a vice principal, for whose acts and neglects the master is liable. Beyond this the master is liable only for his own personal negligence. This is plain, sound, safe and practicable line of distinction. We know where to find it and how to define it. It begins and ends with the personal duties of the master. Any attempt to refine, based upon the notion of "grades" in the service or, what is much the same thing, distinct "departments" in the service, (which departments frequently exist only in the imagination of the judges and not in fact), will only breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the judges that made it seem to be able to "Find no end in wandering mazes lost."

"The real inquiry is: was the injury caused by another servant one of the ordinary risks of the particular employment? if so the grade, whether higher, lower, or co-ordinate, or the department of the faulty servant, is of no consequence."

"It is a condition of the contract of service that the servant takes upon himself the risk of accidents in the common course of the business, all open and palpable risks, including the negligence of all fellow servants of whatever grade in the same employment."

Judge Dillon's Article (Supra.)

This statement of the test of fellow service is sustained (inter alia) by the following authorities:

Crispin vs. Babbitt, 81 N. Y. 516.
Cosker vs. Railroad, 84 id. 77.
Brick vs. Rochester Railroad, 98 id. 211.
Loughlin vs. State of New York, 105 id. 159.
Hussey's Case, 112 id. 614.
McKinnon vs. Norcross, 149 Mass. 533.
Lindwall vs. Woods, (Minn.) 42 N. W. Rep. 1020.
Quinn vs. Lighterage Co., 23 Fed. 363.
Mealman vs. U. P. R. R. Co., 37 Fed. Rep. 189.

The case of Garrahy vs. Railroad, 25 Fed. Rep. 258, is squarely in conflict with Randall vs. the Baltimore & Ohio R. R. (supra). Pike vs. Chicago & Alton R. R. Co., 41 Fed., follows the Garrahy case as being the law of the Eighth Circuit.

The case of Howard vs. Delaware & Hudson Canal Co., 41 Fed. Rep., page.....involves the precise point at issue in the Hambly case. The plaintiff's intestate was a trackman on the railroad and was killed by the negligence of those in charge of a train. The court held upon the supposed authority of the Ross case, that those in charge of the train were not fellow servants with the deceased.

The editor of the American and English Railroad Cases, commenting upon the opinion

in the Howard case (supra), uses the following language, which is quoted as applicable to the principles involved in this appeal:

"The substance of the court's argument is found in the sentence: "If the Company is responsible to trainmen for the negligence of those in charge of the track, that it should be held responsible to trackmen for the negligence of those in charge of its trains, would seem to directly follow."

"With all due respect to the learned and eminent judge, we beg to say that it does not follow at all, and this for reasons perfectly sound. A railroad company is held responsible for injuries to trainmen caused by the negligence of track hands in failing to keep the track and road bed in a suitable condition, for the reason that the law implies a contract on the part of the master to provide the servant with machinery and appliances adequately safe for use. The track and road bed of a railroad are among such appliances. Therefore, when the company delegates the duty of seeing that these are kept in safe and suitable condition to section men, track walkers, etc., they become the representatives of the company, its vice-principals.

McKinley on Fellow Servants, sec. 29, p. 139.

"But this rule has not the least application when the conditions are reversed. The em-

ployees running the train do not exercise any of the personal functions of the master, and they have delegated to them none of the duties which the company contracts with its servants to perform with reasonable care. The engineer's duty, to keep a lookout, to run at a proper rate of speed and to give proper signals so as to avoid injuring track hands, is not different in its character from any of the ordinary duties imposed upon railroad servants. If the company is held liable for their negligent performance, the fellow servant rule is nullified.

"But the court pins its faith to the case of Chicago, M. & St. P. R. R. Co. vs. Ross, 112 U. S. 377. That decision has been made to do duty ever since it was decided in the way of supporting fallacious arguments on this question of co-service. It is not surprising, then, that the court in the present instance attempts to find some support in it. The only point decided in the Ross case was that the negligence of the conductor of a railway train is, as regards other train hands, the negligence of the company. Justice Field, in his opinion, expressly limited the decision to this narrow point. The deduction from this case of what he considers support is accomplished by Judge Wheeler, in these words: "Trackmen are no more co-laborers with trainmen than the trainmen of one train are with those of another train on the same road, and not so much so as trainmen of the same

train are. Those in charge of this train were placed there and clothed with that authority by the defendant. They acted for the defendant in the exercise of the control given them over the movements of the train; and their negligence in that behalf appears, according to this decision of the Supreme Court of the United States, to be the negligence of the defendant." No one questions the assertion that the trainmen control the movements of the train and that they are placed on the train for that purpose. But does the eminent judge intend to assert as a principle of law that any employee who controls the operation of any machinery or appliance which the master places in his hands, is a vice-principal as regards any other employee who may be injured by his negligence? If the principle applies to train hands, it applies to all other employees controlling appliances of the master. As an illustration, if, in the shops of a railroad company, a servant employed at the anvil should negligently strike a co-laborer with his hammer, they could not be considered fellow servants under the common law rule, for the wielder of that hammer was "placed" at that anvil and "clothed with authority" to swing his hammer by the company. He acts for the company "in the exercise of the control given him over the movements of the" hammer, and "his negligence in that behalf" would equally appear under this argument, "according to the Supreme Court of the United States, to

be the negligence of the" company. But in truth, the decision of the National Supreme Court, however erroneous it may be, was never intended to sanction any such absurd doctrine. It does not furnish the least support for the decision in the principal case, which must be ranked as another of those efforts to soften the so-called rigor of the law at the expense of an accurate judgment."

Note to Howard vs. R. R. (Supra), 41 A. & E. R. R. Cases 477.

The running of trains upon its railroad in such a way as not to injure other servants at work on or about its track, is not an absolute duty which the master owes to its employes. Such a requirement cannot rightfully be classed under any of the exceptions to the fellow servant rule, unless it be that of the different department limitation; and, as we have already seen, this court in the case of Quebec S. S. Co. vs. Merchant (supra) has seemingly disapproved of that doctrine.

With respect to Hambly, the railroad had discharged every duty which it owed him. The appliances of every character were in perfect order and the persons in charge were competent. The Company owed him no further duty. It could no more be present upon the engine to manage it carefully and prudently than it could warrant him against the negligent use of a pick or shovel by a fellow trackman.

The true test in all cases, as to whether the negligent servant is a vice-principal is, was the act with respect to which he was negligent, one which he was employed to do for and in the place of the master.

Curtis vs. Granitville Mfg. Co., 18 S. C. 362.

Shearman & Redfield on Neg. Sec. 1041.

If Judge Dillon's statement of the test of fellow service and vice-principal be correct and the same be determined not by the grade, rank or department of the faulty servant, but by the character of the act out of which the injury flows, we shall find a ready and easy solution of the question presented in this appeal.

The matter resolves itself into the simple inquiry whether the negligent use of a perfectly constructed engine, by competent persons in charge, upon a track in perfect repair, is to be adjudged the violation of any "personal, inalienable, non-assignable duty," which the company owed to Hambly. None of the exceptions to the rule in Farwell's case (save these made in the departmental limitation in Illinois and certain southern states already referred to, and in Iowa and Kansas where the fellow servant rule has been abolished by statute) would support an affirmative answer. To hold the master liable for the negligent use of perfectly safe machinery in the hands of competent servants, would revolutionize the whole doctrine of

the former's liability to his servant for the laches or torts of his fellows and would place such liability on an equality with that which governs common carriers with respect to injuries inflicted by them upon their passengers.

"Such a construction would make any negligent misplacement of a switch, any negligent collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a safe place. The true idea is that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that no negligent handling by an employee of the machinery shall create danger."

Judge Brewer in Howard vs. Denver R. R. 26 Fed. 837.

"If the place where the plaintiff was injured was unsafe only because of negligence in the management of the cars, that is simply the case of danger and injury caused by the wrongful conduct of fellow servants."

Connoly vs. Minneapolis R. R. Co. 35 N. W. Rep. 583.

The following is a partial list of cases in which it has been held that an engineer was a fellow servant with a laborer upon the track:

Vick vs. R. R., 95 N. Y. 267.
Easton vs. R. R., 32 Fed. 893.
Clifford vs. R. R., 141 Mass. 564.
R. R. vs. Welch (Tex.), 10 S. W. R. 529.
Collins vs. R. R., 30 Minn. 31.

Van Wickle vs. R. R., 32 Fed. 278.
Flagundes vs. R. R. (Cal.) 21 Pac. R. 457.
R. R. vs. Wachter, 60 Md. 395.
R. R. vs. Shackelford, 42 Ark. 417.
Buckley vs. Gould. 14 Fed. 833.
Wood vs. New Bedford, 12 Mass. 252.
Connolly vs. Minneapolis R. R., 35 N. W. R. 583.
Schultz vs. R. R., 67 Wis. 616.

The case of Gormley Admr. vs. Ohio & M. R. R. Co., 72 Ind., is an exact parallel to Hambly's case. Plaintiff's intestate was a track hand injured by the negligent manner in which a freight train was run upon the R. R. where he was employed. The court held, citing and following other Indiana decisions, that the relationship of fellow servants existed between deceased and the faulty engineer, and the plaintiff could not recover.

See also:

Slater vs. Jewett, 84 N. Y. 61.
Ryan vs. Cumberland R. R., 23 Pa. St. 384.
Blake vs. Maine Central R. R., 70 Me. 60.
Ohio R. R. vs. Collarn, 73 Ind. 261; 38 A. R. 134.
Whalen vs. Mad River &c., 8 Ohio St. 249.
Chicago R. R. vs. Keefe, 47 Ills. 108.
Bolt vs. N. Y. Cent. R. R., 18 N. Y. 432.
Sullivan vs. M. & M. R. R., 11 Iowa 421.

That Hambly, injured in the service as a trackman, must be presumed to have taken all

the ordinary risks of the employment, including the risk of accidents happening by the negligent acts or omissions on the part of other servants engaged in the same undertaking, is a proposition so well established as to require no authorities to be cited in its support.

R. R. Co. vs. Herbert, 116 U. S. 642 & 647.

Randall vs. B & O. R. R., 109 U. S. 483.

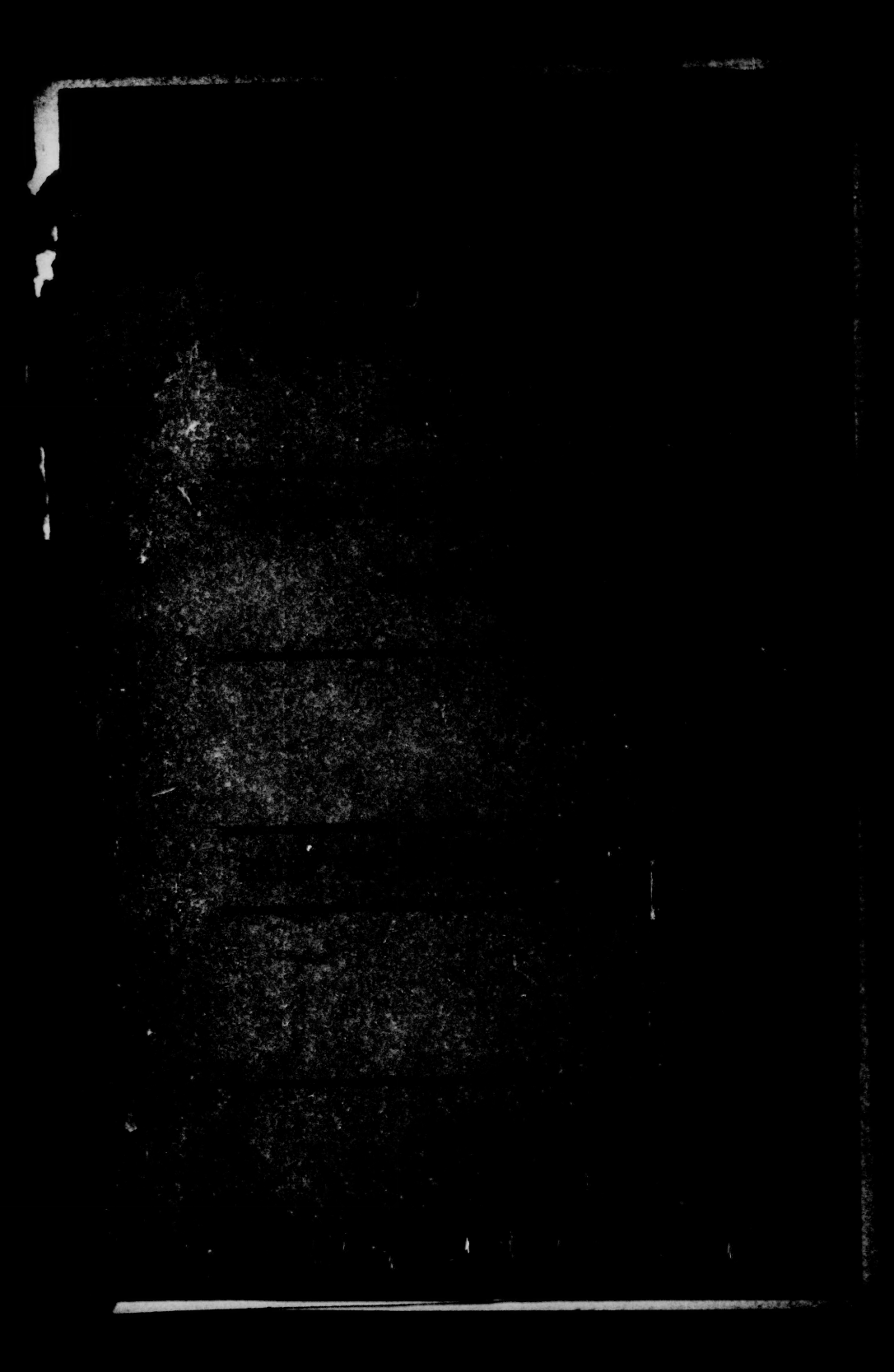
Hambly voluntarily undertook a service, which of itself placed him in a position of danger, where incessant vigilance alone could protect him from injury from the operation of the Company's trains; while he was engaged upon the track and in the repair of the culvert, trains of the Company were continually passing over the road, thus furnishing him hourly with fresh reminders of danger. Under all these circumstances he voluntarily entered upon and continued in the service until he received his injury.

We think he thereby assumed the risks of accident occasioned by the negligence of another servant in the employment of the common master.

Respectfully submitted,

JNO. S. WATSON,
Att'y for N. P. R. R. Co.
Plaintiff in Error.

JAMES MCNAUGHT,
Of Counsel.



IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error.

vs.

GEORGE HAMBLY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The certificate of division of opinion is imperfect. The point on which there is a disagreement is not distinctly stated and sufficient facts are not set forth to show the bearings of the question on the rights of the parties. It is said that the negligence which caused the injury to defendant in error was that of the conductor and engineer of a passenger train, owned by plaintiff in error, in operating and conducting the movements of said train.

The case of Railroad Co. vs. Ross 112 U. S. 377, assumes that the conductor of a train of cars "has entire control and management of the train to which he is assigned," and holds that he is the superior of the engineer. On the other hand the case of Randall vs. Railroad Co. 109 U. S. 478, holds the engineer to be a fellow servant with a brakeman of another train working a switch. It is therefore important to know whether the negligence is to be charged to the engineer or to the conductor, and in what it consisted. In the certificate the negligence is attributed to the conductor and engineer jointly; but the facts con-

4 stituting negligence are not stated; and this court is called upon to give an opinion upon a purely hypothetical question which may be wide of the real question at issue. How can the conductor and engineer be jointly guilty of the proximate act which resulted in the injury to defendant in error? If the fault was that of the conductor, then is the railroad company liable as for the act of its representative or vice principal; but if the fault was that of the engineer then
5 he is held to be a fellow servant.

The facts should be set forth in the certificate to show to whom the conceded negligence was properly chargeable and because this is not done the cause should be remanded to the Circuit Court.

Carvie vs. The Knox Insurance Co. 18 How. 577.

United States vs. The City Bank of Columbus
6 19 How. 385.

Gould & Tucker's Notes on Rev. Stat's § 693.

The maxim, Respondeat Superior, does not apply so as to make a master responsible for injuries caused to one servant by the negligence of another in the same common employment, but this exception to a general rule has been subjected to various limitations.

As a limitation upon the fellow servant rule, the exception has been made and is now quite well estab-
7 lished, that when servants are engaged in distinct and separate departments of service, where their employment does not require co-operation, and does not result in mutual contact or bring them together in such relation that they may exercise upon each other an influence promotive of caution or safety, the rule does not apply.

The reasons for the fellow servant rule do not fit the facts of this case. There are two principal rea-

sons urged for exempting a master from liability to one servant for an injury caused by the negligence of another servant in the same common employment. First; that the servant contracted his services with reference to and assumed the risk resulting from the negligence of his fellow servant. Second; the expediency of throwing the risk on those who can best guard against it.

The first reason cannot be applied to this case, because it applies only to the ordinary risks of the service. Where the peril grows out of extrinsic causes or circumstances which cannot be discovered by the use of precaution and prudence, then the master is liable.

Baird vs. Pettit 70 Pa. St. 477—482.

We are met here with the uncertainty of the certificate of the judges.

Hambly is said to have been struck by the locomotive of a moving passenger train, but the manner or circumstances are not stated so that it can not be urged that the peril (whatever it was) was an ordinary risk of the service or one which he could have guarded against by any degree of prudence or precaution. To sustain the judgment of the Court below, it ought rather to be presumed that the peril was extraordinary, not incident to the employment and therefore not assumed.

The second reason, that the rule is founded on the expediency of throwing the risk upon those who can best guard against it; first declared in Farwell vs. The Boston & Worcester R. Co. 4 Metc. 49, has received the indorsement of many courts. Shaw C. J. said: "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care

and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require."

This was not a good reason when enunciated; and applied to railroad corporations of the present day it is entirely unfounded and misleading.

To say, as in the Farwell case, that the engineer who was injured was an observer of the conduct of the switchman who negligently left a switch open, and could best guard against such negligence, is unwarranted by common knowledge of railroad business.

Assuming in the present case that the negligence was that of the conductor or persons having the care and control of a moving passenger train, can it be said that such a reason will fit the facts of this case? Can Hambly, a common laborer working on a culvert on the line of railroad be said to be an observer of the the conduct of the person or persons in charge of the passenger train? Does he have any opportunity to guard against their negligence? Does he come in contact with them so as to learn their habits, methods or recklessness? He has nothing to do with train service, may never before have seen the conductor or engineer. It is manifest that one in his position could have no influence over the persons in charge of the passenger train since their business did not bring them together. If he had noticed their reckless conduct on previous occasions he might have reported them to the common master but what if he had not met them before? What if

their first act of negligence was the circumstance which terminated his service and his interest in them or their negligence?

In support of the proposition that persons in charge of trains are not fellow servants in the same common employment with persons working along the track, it is held; in Garrahy vs. Kansas City St. J. & C. B. R. Co., 25 Fed. Rep: 258, that a common hand engaged in distributing rails along a railroad track, is not in the same employment as a man in charge of a switch engine; in Pike vs. Chicago & A. R. Co., 41 Fed. 95, that a bridge watchman on a railroad and the conductor are in different departments of the Company's service and are not fellow servants; in Chicago etc. R. Co. vs Moranda, 93 Ill. 302, that a section hand, injured while standing at the side of the track to avoid a passing train, is not a fellow servant with the fireman of such train; in Sullivan vs. Missouri Pac. R. Co., 97 Mo. 113, s. c. 10 S. W. Rep. 852, that a section hand is not a fellow servant with those in charge of a passenger train; in Richmond & D. R. Co. vs. Norment, 4 S. E. Rep. 211 (Va.), that a car repairer, at work under a car, is not a fellow servant with the conductor of a switch engine in the sense which would relieve the employer from liability for an injury to the former caused by the negligence of the latter in shifting cars; in Dick vs. Indianapolis etc. R. Co., 8 Amer. & Eng. R. Cases 101 (Ohio), that the master is not exempt from liability for an injury to a section hand caused by those in charge of a train running such train around a curve without signals and at a high and reckless rate of speed; in Hobson vs. New Mexico & A. R. Co., 28 Amer. & Eng. R. Cases 360, that a teamster who hauls ties in the construction of a railroad is not con-

20 sociated with the engineer of the train on which the workmen ride to dinner so as to defeat his recovering against the company for injuries caused by the negligence of the engineer.

In King vs. Ohio etc. R. Co., 14 Fed. 277, where a brakeman was injured by the negligence of a car coupler, Judge Gresham said: "The master's immu-"nity is limited to cases where the servants are en-"gaged in the same common employment; that is to
21 "say, in the same department of duty. Such immu-"nity does not extend to cases where the servants "are engaged in departments essentially foreign to "each other." The decision of this case rests on other grounds.

The rule laid down in the Farwell case was grounded on public policy, the Court saying that, "in considering the rights and obligations arising out
22 of particular relations, it is competent for Courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned."

Not being founded in exact justice, the reasons for the rule have failed in a variety of cases and a number of limitations have arisen or sprung from the hardships of a general application of a rule found
23 solely on alleged public policy.

Where a duty which the master owes his servants, as the furnishing and maintaining of safe tools and appliances, has been delegated to a servant, the negligence of the latter is the negligence of the master.

Northern Pacific R. Co. vs. Herbert, 116 U. S. 642.

This case also holds that the Dakota statute on the liability of a master to his servants does not change the common law.

The negligence of a superior servant who has authority to direct the movements of those subordinate to him, is another exception or limitation to the fellow servant rule.

Ross vs. C. M. & St. P. R. Co., 112 U. S. 377.

It is also said in the Ross case: "There are in this country many adjudications of Courts of great learning, restricting the exemption to cases where the fellow servants are engaged in the same department, and act under the same immediate direction, and holding that, within the reason and principle of the doctrine, only such servants can be considered as are engaged in the same common employment."

The following cases support such statement:

Ryan vs. C. & N. W. R. Co., 60 Ill. 171, where a common laborer in the carpenter shop of a railroad company, was injured by the negligence of the engineer in charge of a passing train.

Chicago & A. R. Co. vs. Kelley, 21 N. E. Rep. 203 (Ill.)

Railroad Co. vs. Weaver, 11 Pac. Rep. 408 (Kan.), where a section hand was injured by the negligence of an engineer upon a passing locomotive.

Madden vs. Chesapeake & O. R. Co., 28 W. Va. 610.

Northern Pac. R. Co. vs. O'Brien, 21 Pac. Rep. 32 (Wash. Ter.)

Cooper vs. Mullins, 30 Ga. 146.

Central Trust Co. vs. Railroad Co., 34 Fed. 616, relating to employes on different trains.

L. & N. R. Co. vs. Collins, 2 Duv. (Ky.) 114, a common laborer employed loading and unloading cars injured through the negligence of an engineer.

O'Donnell vs. Allegheny, etc. R. Co., 59 Pa. St. 239, a carpenter in the employ of a railway com-

pany, transported to and from his place of labor, is not a fellow servant in the same common employment with the men who have charge of the train.

Moon vs. Richmond & A. R. Co., 78 Va. 745, where a brakeman was injured by the negligence of a section foreman working on the track.

And see,

Railroad vs. Carroll, 6 Heisk (Tenn.) 347.

Louisville & N. R. Co. vs. Sheets, 13 S. W. Rep. 248 (Ky.)

Lawson's Rights, Remedies and Practice § 320.

Sherman & Redfield on Neg., 4th Ed § 234.

McKinney on Fellow Servants, § 72, 73, 74, 75.

Donaldson vs. Railroad, 18 Iowa 280.

In Ragsdale vs. Northern Pac. R. Co., 42 Fed. 383, it is held, that the fireman on one train is not a fellow servant with the conductor of another train; and in Howard vs Delaware & H. R. Co., 40 Fed. 195, that trackmen are not fellow servants of those in charge of trains. These cases are decided on the authority of the Ross case. It is held, that if the conductor is a vice-principal as to employes on his train, and his negligence, the negligence of the company, then the same rule must obtain when by his negligence the employes on another train are injured. If by one act of negligence of a conductor an employe of his train and one of another train are injured, "upon what theory," says Judge Shiras, in Ragsdale vs. Northern Pacific R. Co., "can there exist a liability in the one case and not in the other."

It is not consistent with public policy that one should have a remedy and the other not. It would be unjust. It cannot be argued that one assumes the risk and the other does not. The employes on the negligent conductor's train have better oppor-

tunities to observe his conduct and to guard against his negligent acts than the employes on another train.

If the reasons which influenced the Farwell decision, do not exist; if one of these employes did not assume the risk of the conductor's negligence more or different from the other, and it would be absurd to say that such is the case; if the employe on another train has no better opportunity of observing the conduct of the conductor than one on the same train with such conductor, then there is no theory or principle to distinguish between the two cases and the master would be liable in both.

With greater force can it be asked, Upon what theory can it be held that the conductor of the passenger train in the case at bar was a fellow-servant with the laborer at work on a culvert on the railroad? Under the authority of the Ross case, if the brakeman on the train had been injured in the same negligent circumstance, the company would be held liable. Yet the brakeman was acquainted with the conductor, made the run with him frequently, knew his habits and had a better opportunity to observe his actions than the laborer working on the culvert.

Hambly was not engaged in and had no such knowledge of train service as was possessed by the brakeman. His duties did not bring him to work at the same place and at the same time as the conductor. Their separate service did not have a common object. While they were both servants of the same master, the one was engaged in the train department and the other in the bridge department. Unless the entire operations of an extensive and wide spread railroad corporation can be grasped in the expression, general business or common employment, then these

men were not fellow servants. While it may be said that the conductor represented the master as a vice principal and was for that reason not a fellow servant with the defendant in error, yet it seems the better reason that he was not a fellow servant because not in the same common employment.

There is a clear distinction between this case and Randall vs. Baltimore & O. R. Co. 109 U. S. 478. In that case the brakeman of one freight train was injured by the engineer of another freight train, while they were engaged in switching their respective trains in one yard. Of them it was said by Mr. Justice Gray; "The duties of the two bring them to "work at the same place at the same time, so that "the negligence of the one in doing his work may in- "jure the other in doing his work. Their separate "services have an immediate common object, the "moving of trains."

Hambly's duties as a common laborer assisting to build a culvert on the line of railroad did not bring him to work at the same place with the conductor and engineer of the passenger train.

He was not engaged in train service or track service, unless a hod carrier engaged in assisting stone masons in the construction of a culvert or building of the railroad company may be said to be engaged in the general business of the corporation, which is a term broad enough to include train service and every other service which can be rendered.

The case of Elliot vs. C. M. & St. P. R. R. Co. 41 N. W. 758. (Dakota Ter.) may be further distinguished, because the duties of the section foreman, who was injured by the negligence of the conductor of a moving train, "required him to be on and about "the track to keep it in proper condition for running

"trains over it, and placed him in a situation where
"he was liable to be injured by passing trains [illegible]
"of the duties which he was employed to perform,
"necessarily required his presence on the track."

None of which is true of a laborer in assisting in the building of a culvert.

Respectfully Submitted,

S. L. GLASPELL,

Att'y for Defendant in Error

[redacted]

[redacted]

NORTHERN PACIFIC

GEORGE HANDLY

[redacted]

UNDER

[redacted]

IN REPLY TO

[redacted]

No. 784.

Supreme Court of the United States.

OCTOBER TERM, 1891.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error.

vs.

GEORGE HAMBLY,
Defendant in Error.

MOTION TO SUBMIT
UNDER 20TH RULE AND STIPULATION ON FILE.

SAMUEL L. GLASPELL,
Counsel for Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

STATEMENT OF THE FACTS.

The printed record and briefs for plaintiff and defendant in error are now on file. The record was filed September 18th, 1890. It contains a stipulation, to submit under the 20th rule, filed originally in the lower court (printed record p. 25) in words and figures following; to-wit: "The judges having been opposed in their opinions in this cause and having granted a certificate of their division of opinion

in conformity to the statute, it is hereby agreed and stipulated that the case shall be submitted to the Supreme Court of the United States under the 20th rule of that Court, and that the record shall be filed in that Court by the first day of September next by the defendant and printed briefs filed in the case by the second Monday of October next."

Dated April 29th, 1890.

The briefs were filed within the first ninety days of the October, 1890, term. The record was not printed, however, within such time and the failure in that regard was not known by defendant in error until too late to procure the printing to be done. The clerk of this court has declined to present the cause for submission, by letter to counsel for defendant in error, dated Dec. 1st, 1891, wherein he says: "Yours of the 27th ulto. received. The stipulation printed in the record in the case of the N. P. R. R. Co. vs. Hambly, No. 784, provided that the record be filed by the 1st of September, 1890, and briefs filed by the second Monday in October, 1890. The provisions of the above stipulation were not carried out, the record not being filed until the the 18th of September, 1890, and briefs for defendant in error not being filed until the 8th day of January, 1891, nor was the record printed in time to submit at the October term, 1890. Under these circumstances, I can not comply with your request, and would suggest that if you desire the terms of the stipulation carried out you make a motion to that effect in open court."

MOTION.

And now comes the defendant in error by his counsel, Samuel L. Glaspell, and moves the Court to order the submission of this cause pursuant to the 20th Rule and the stipulation to that effect now on file.

SAMUEL L. GLASPELL,
Counsel for defendant in error.

JAN 2
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE NORTHERN PACIFIC RAILROAD COMPANY, *Plaintiff in Error*,

vs.

GEORGE HAMBLY.

No. 784.

Response of the Plaintiff in Error to the Motion of Defendant in Error to Submit the Case Under Rule 20.

The stipulation referred to in defendant's motion (Rec., 25) is not such as this court can recognize. The stipulation, according to the rule and practice of this court, must be signed by counsel and filed in this court; and then counsel must call up the stipulation in court and move for the submission upon it.

Besides, this stipulation by its own terms has exhausted itself. It pertained alone to the October term of 1890, and that passed without any action upon it.

Further than this, the defendant himself waived this motion to submit on that stipulation, if there was ever anything in it, by coming forward and filing in this court, at this term, a motion to dismiss the case, which motion, after argument on briefs to the court, was, on the 9th of November last, overruled.

After this, when, if the term can be applied to things at all, this stipulation was *functus*, defendant's counsel wrote to the clerk of this court to have the case submitted, under rule 20, and the clerk, on 1st December last, answered him he could not do so, and proceeded to give him quite good and sufficient reasons therefor. This response of the clerk is a part of defendant's present motion, and it is full and certain to every intent.

But the day for submission under rule 20, at this term, has passed some time since. By the most liberal extension it expired on the 11th inst., two days before the present motion and notice under it were drawn up; and it is, therefore, too late to submit the case, if even there were an actual living stipulation on file to that effect.

Upon the motion to dismiss already alluded to, the court, it is taken for granted, acquainted itself with the points involved. They are important and require argument beyond what is to be expected in briefs. Indeed, the main question is a *close one*, and if any question needs an oral presentation to the court, this does.

Under all the circumstances it is submitted this motion should not prevail.

Respectfully,

A. H. GARLAND,
H. J. MAY,
For Plaintiff.

January 20, 1892.